TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 107

MISSOURI PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

et al.

E. W. PORTER AND D. S. WEAVER, DOING BUSINESS AS PORTER-WEAVER COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED MAY 11, 1926

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No. 453

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E. W. PORTER AND D. S. WEAVER, DOING BUSINESS AS PORTER-WEAVER COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1925

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[fol. 1] [Caption omitted]

[fol. 2] **IN CIRCUIT COURT OF PULASKI COUNTY**

E. W. PORTER and D. S. WEAVER, Doing Business as Porter, Weaver & Company, Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant

BILL OF COMPLAINT—Filed Oct. 18, 1922

Comes the plaintiffs by J. C. Marshall, their attorney and for cause of action state:

That they are and were at the times hereinafter mentioned a firm doing business as Porter, Weaver and Company and that defendant is and was at the time hereinafter mentioned a corporation duly organized under the laws of Missouri and doing business in that State, in the State of Arkansas and other States as a common carrier of goods.

That on the 21st day of October, 1920, at Earle, Arkansas, in consideration of 98½¢ per one hundred pounds paid it by plaintiffs, defendant agreed to carry safely and deliver by its own and connecting lines to plaintiff or their order at Brunswick Georgia, for export to England seventy-five (75) bales of cotton, shipper's weight 39,955, the property of the plaintiffs of the value of $16,479.73 which the plaintiffs then and there delivered to defendant who received the same upon the agreement and for the purposes bfore mentioned as shown by copy of bill of lading attached hereto.

That all provisions in said bill of lading seeking to exempt defendant from its liability imposed by the common law are void and of no effect for the reason that such attempted exemption is with-

[fol. 3] out consideration and defendant is liable to plaintiffs for the loss of said cotton notwithstanding such provision.

That defendant did not carry and deliver said cotton as agreed but failed to do so the same having been destroyed by fire as plaintiffs are informed and believed while in possession of defendant as a common carrier and were wholly lost to plaintiffs to their damage in the sum above stated with legal interest thereon for which they pray judgment and for cost and other proper relief.

J. C. Marshall, Attorney for Plaintiffs.

[File endorsement omitted.]

Return of Sheriff, shows service of Summons upon Missouri Pacific Railroad Company by delivering a true copy to C. C. Goss, designated Agent for service for said Railroad Company, at said County on October 20, 1922.

[fol. 4] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MINUTE ENTRY—Nov. 13, 1923

On this day comes the defendant by its attorney, R. E. Wiley, Esqr., and by leave of the Court files herein its answer.

[fol. 5] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ANSWER—Filed Nov. 13, 1922

Defendant denies that on October 21, 1920, at Earle, defendant agreed to carry safely and deliver to plaintiffs or their order at Brunswick, Georgia, for export to England, seventy-five (75) bales of cotton or any other number of bales, or that it weighed 39,955 pounds or was the property of the plaintiffs, or was of the value of $16,479.73, or that plaintiffs delivered to defendant said cotton, or that defendant accepted or received it or issued its bill of lading therefor.

Denies that the provisions of the bill of lading seeking to exempt defendant are void, or without consideration, or that defendant is liable to plaintiffs for loss of the cotton.

It denies that defendant did not carry and deliver said cotton, or that same was destroyed by fire while in the possession of defendant as a common carrier.

II

For further answer defendant here states that the bill of lading on which plaintiff relies contains, among others, the following provisions:

[fol. 6] "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after the arrival of the property, and if delayed for more than nine months after the delivery of the property, or after due time for the delivery therefor, no carrier hereunder shall be liable in any event."

No claim for loss or damage was made in writing as required by said provision within nine months after delivery of the property or after due time for the delivery theerof.

Said bill of lading also provides:

"No carrier or party in possession of said property shall be liable for any loss thereof by causes beyond its control, or by floods or by fire or by riots, strikes or stoppage of labor."

If said cotton was lost, it was by causes beyond this defendant's control, and defendant is not liable.

III

Defendant pleads the one-year statute of limitation and the two-year statute of limitation, in defense of this action.

IV

The bill of lading provides that "the amount of loss or damage for which any carrier becomes liable shall be computed at the value [fol. 7] of the property at the place and time of shipment under this bill of lading.

R. E. Wiley, Attorney for Defendant.

[File endorsement omitted.]

[fol. 8] In Circuit Court of Pulaski County

[Title omitted]

Minute Entry of Order Passing Cause—March 6, 1923

On this day this cause is hereby passed.

[fol. 9] In Circuit Court of Pulaski County

[Title omitted]

Judgment—Aug. 30, 1923

On this day come the plaintiffs, by their attorney, J. C. Marshall, Esqr., and the defendant, by its attorney, R. E. Wiley, Esqr., and this cause now coming on to be heard, both parties announce ready for trial, and both parties in open court, waive a jury, and agree to try this cause before the Court sitting as a jury; thereupon this cause is submitted to the Court sitting as a jury, upon the agreed statement of facts, the oral testimony introduced and the argument of counsel; and the Court being well and sufficiently advised, doth find that the defendant is justly indebted unto the plaintiffs, in the sum of $9,389.42, together with interest thereon at the rate of 6% per annum from the 21st day of October, 1920, which interest to date amounts to the sum of $1,610.28, amounting in the aggregate of principal and interset to date to the sum of $10,999.70;

It is, therefore, considered, ordered and adjudged by the Court that the plaintiffs, E. W. Porter and D. S. Weaver, doing business

[fol. 10] as Porter, Weaver and Company, do have and recover of and from the defendant, Missouri Pacific Railroad Company, the sum of Ten Thousand Nine Hundred Ninety Nine & 70/100 ($10,999.70) Dollars, for their debt and interest to date, together with all of their costs in and about this cause expended, for which execution may issue.

And defendant upon its motion is given until September 22, 1923, within which to file its motion for a new trial herein.

[fol. 11] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MINUTE ENTRY OF FILING OF MOTION FOR NEW TRIAL—Sept. 22, 1923

On this day comes the defendant by its atorney, R. E. Wiley, Esqr., and by leave of the Court files herein its motion for a new trial.

[fol. 12] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Sept. 22, 1923

Defendant moves for a new trial of this action, and for cause states:

1. The verdict and judgment herein are contrary to the law.

2. The verdict and the judgment herein are contrary to the evidence.

3. The verdict and the judgment herein are contrary to both the law and the evidence.

4. The court erred in finding the facts in favor of the plaintiffs.

5. The court erred in finding the law in favor of the plaintiffs.

6. The court erred in rendering judgment in favor of the plaintiffs.

7. The court erred in ruling that the provision of the bill of lading that the carrier should not be liable for loss of the cotton by fire was invalid and was unenforceable.

8. The court erred in ruling that the statutes of the State of Arkansas applied to this shipment and governed the rights and [fol. 13] liabilities of the parties thereto.

9. The court erred in refusing to rule that the rights and liabilities of the parties to this shipment are governed by federal legislation and the common law rules as accepted and applied in the federal court.

10. The court erred in refusing to rule that the Congress of the United States had entered the field of regulation of foreign commerce and that thereby all legislation of the State of Arkansas was superseded and that this shipment was governed by the federal law and not by the State of Arkansas.

11. The court erred in refusing to declare the law as prayed in defendant's prayer for instruction numbered One.

12. The court erred in refusing to declare the law as prayed in defendant's prayer for instruction numbered Three.

13. The court erred in refusing to declare the law as prayed for in defendant's prayer for instruction numbered Four.

14. The court erred in refusing to declare the law as prayed in defendant's prayer for instruction numbered Seven.

15. The court erred in refusing to declare the law as prayed in defendant's prayer for instruction numbered Eight.

16. The court erred in refusing to render a verdict and judgment for defendant.

[fol. 14] 17. The verdict is excessive.

18. The court erred in its declaration or finding of law on its own motion to the effect in substance that Section 843 and 844 of C. & M. Digest of statutes of Arkansas governed the shipment and that defendant is liable for the market value of the cotton at the place and time of shipment.

R. E. Wiley, Attorney for Defendant.

[File endorsement omitted.]

[fol. 15] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL AND ALLOWING APPEAL—Sept. 22, 1923

On this day defendant's motion for a new trial herein now coming on to be heard, same is submitted to the court after argument of counsel; and the court being well and sufficiently advised, doth overrule said motion;

To which action of the court in overruling said motion for a new trial the defendant at the time excepted and asked that its exception be noted of record, which is accordingly done;

Thereupon defendant prayed an appeal to the Supreme Court of Arkansas which is granted, and upon its motion it is given ninety days time within which to prepare and present its bill of exceptions herein.

[fol. 16] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—Dec. 20, 1923

On this day comes the defendant by its attorney, R. E. Wiley, Esqr., and presents to the court its bill of exceptions herein, and said bill of exceptions after being examined by the court and being found to be in all things correct, is approved by the court and ordered filed as a part of the record in this case.

[fol. 17] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

Bill of Exceptions

CAPTION

Be it remembered, that heretofore, to-wit: On the 24th day of May, 1923, the above entitled cause came on for hearing before the Honorable Marvin Harris, Judge of the 3rd Division of the Pulaski Circuit Court, upon the pleadings heretofore filed herein. By express agreement of counsel a jury was waived and the case submitted to the court sitting as judge and jury.

APPEARANCES OF COUNSEL

Hon. J. C. Marshall, appearing for Plaintiff.
Hon. R. E. Wiley, appearing for defendant.

[fol. 18] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Wiley: The defendant wishes to amend its answer by pleading that the measure of damages is the invoice price of the cotton at the time it was delivered to the carrier.

Court: That is all right.

Exhibit "A"

Agreed Statement of Facts

It is hereby agreed by both parties that the facts in this case are in part as follows:

Plaintiffs are a partnership composed of E. W. Porter and D. S. Weaver, and defendant is a corporation duly organized under the laws of the State of Missouri and is a common carrier of goods in Arkansas and other States.

That on October 21, 1820, the Missouri Pacific Railroad Company received from Porter, Weaver & Company, at Earle, Arkansas, 75 bales of cotton referred to in the petition, of the value of $—, for shipment to Liverpool, England, and on said date issued to said shippers an export bill of lading, an exact copy of which is attached and made part hereof, consigning said shipment to shipper's order, Liverpool, England; that after the execution of said [fol. 19] bill of lading and before said cotton had been removed by the carrier from Earle, Arkansas, and while same was on the cars of defendant preparatory for shipment same was destroyed by a fire originating at the compress at Earle, Arkansas, and not set by defendant; that the only issue in the case is whether in view of the execution of the bill of lading with the condition hereinafter referred to in regard to loss by fire the carrier is liable for such loss and damage by fire; that said export bill of lading under and pursuant to which this shipment was made provided that the carrier should not be liable for loss of said cotton occasioned by fire; that claim for the loss in question was timely filed and declined by the carrier and suit thereafter was timely filed for said loss.

It is further agreed that plaintiffs shall deposit in court the original shipper's order bill of lading, properly endorsed, which bill of lading shall be marked cancelled and delivered by the Clerk of said court to defendant is judgment is entered for plaintiffs, otherwise, said bill of lading shall be returned to plaintiffs.

Either party may introduce in evidence copies of the official classifications, schedules or rates, rules and regulations or parts thereof [fol. 20] in force at the time said bill of lading was issued, without having *same* certified.

(Signed) J. C. Marshall, Attorney for Plaintiffs. R. E. Wiley, Attorney for Defendant.

Mr. Marshall: I desire to introduce in evidence the original bill of lading.

(The above original bill of lading referred to was here introduced in evidence, read, and marked Exhibit "B" and is as follows:)

[fol. 21] EXHIBIT "B"

Form 1168½—Copy—G. F. O. Authority No. H-2217

This Bill of Lading is Issued in Exchange for Bill of Lading No. —, issued at —— on the — day of ——, by the —— Company.
Export Bill of Lading No. E-One, Lot No. MPA 69, Contract Numbers, Strachan Line 400.

(Missouri Pacific)

Missouri Pacific Railroad Company, in Connection with Other Carriers on the Route

Through Bill of Lading issued under Agreement with the Liverpool Cotton Bills of Lading Conference (1907) Committee and the American Bankers' Association

Received at Earle, Arkansas, from Porter, Weaver & Co. the following property in apparent good order, except as noted (contents and condition of contents of packages unknown) and except that bales of cotton or linters are insufficiently covered by bagging, or such covering is torn, and as to any loss or damage on account of these conditions, or either of them, it is mutually understood and agreed that no carrier on the route to destination shall be liable; marked, numbered, consigned and destined as indicated below.
Consignee and destination: To Order Shippers, Liverpool, England.
Party to be notified: W. H. Midwood & Co., Cotton Exchange Bldg., Liverpool, England.
Copy. Not Negotiable.
Inland Routing: Mo. Pac. M. & O., Bham. A. B. & A., to Brunswick, Ga.

Marks and numbers	Articles
P. W. & Co.	Seventy Five (75) Bales Cotton
PKIN/FG-75	Freight Prepaid Through $1172.68

Inland Rate.... .98½
Ocean Rate.... 1.95
Thru Rate.. $2.93½

*Shippers' Weight 39,955 Pounds. (Subject to Correction.)
(*U. S. Law requires Agents issuing Bill of Lading to write either "shipper's" or "carrier's" before "weight.")

SAAP 7952.

To be carried to the Port (A) of Brunswick, Ga., and thence by Leyland Line to the Port (B) Liverpool, England (or so near thereto as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition, as above consigned, or to consignee's assigns, or to another carrier on the route to destination is consigned beyond

said port (B), upon payment immediately on discharge of the property, of the freight thereon, at the rate from Earle, Ark., to Liverpool, England, of $2.93½ cents, Thru Rate Prepaid.

(If dimensions of bale or bales of Cotton or Cotton Linters does not exceed 27 by 54 inches and providing each bale is compressed to density of 22.5 pounds per cubic foot; any bale exceeding dimensions prescribed that does not show required density shall pay an extra ocean freight of 50 cents per bale unless repressed to required density before delivery to the ocean carrier. Bales of larger measurements than 27 by 54 inches shall pay an extra ocean freight of $1.00 per bale in addition to the rate per hundred pounds herein specified for bales of standard size 27 by 54 inches.)

United States gold currency, per one hundred pounds gross weight, and advanced charges if any — ($—),

"All freight and advance charges are payable at carrier's option in advance or immediately upon discharge of the goods. If paid in advance, payments are to be made in U. S. gold coin, but if paid on delivery, such payments are to be made in its equivalent in local currency at Bank demand rate of exchange of New York, with all other charges and average, without allowance of credit or discount."

In consideration of the rate of freight herein named it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions whether printed or written on the face or back hereof and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

In witness whereof, the Agent signing on behalf of said Missouri Pacific Railroad Company, and of the said Ocean Steamship Company or Ocean Steamer and her owner, severally and not jointly, both affirmed to One Bills of Lading, all of this tenor and date, one of which bills being accomplished the other to stand void.

Dated at Earle, Ark., this 21st day of Oct., 1920.

W. D. Martin, Agent, On Behalf of Carriers Severally, but not jointly. Porter, Weaver & Co., Shipper.

Conditions

Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

I—With respect to the service and delivery at this port, (A) first above mentioned, it is agreed that:—

1. No carrier of party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire; or by quarantine; or by riots, strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay;

or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable, shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events, such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the Agent at point of delivery promptly after arrival of the property, and if delayed for more than nine months after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route Cotton is to be carried hereunder, shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it, within twenty-four hours after its arrival at destination (Port A), may be kept in the car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, and there held subject to lien for all freight and other charges. Property taken from a station at which there is no regularly appointed agent, shall be entirely at risk of owner until loaded into cars; and when received from private or other sidings, shall be at owner's risk until the cars are attached to trains.

6. No carrier hereunder will carry, or be liable in any way for any documents, specie or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are endorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

8. If, upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

9. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the further conditions, that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described, shall have liberty to call at intermediate ports to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property.

10. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession, is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

11. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamer, her master, agent, or servants or to the steamship company, or on the steamer pier at the said port and the inland freight charges shall be a first lien due and payable by the steamship company.

[On margin:] Attention of shippers is called to the Act of Congress of 1851, which provides, that any person or persons shipping Oil of Vitriol, Unslacked Lime, Inflammable Matches, or Gunpowder in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.

II.—With respect to the service after delivery at the port (A) first above mentioned, and until delivery at the port (B) second above mentioned, It is agreed, that:—

1. The steamer shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in craft and or lighters, to and from the steamer at the risk of the owners of the goods; and, in case the steamer shall put into a port of refuge, or be prevented, from any cause, from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamer; that the carrier shall not be liable for loss or damage occasioned by fire, from any cause, or wheresoever occurring; by bar-

ratry of the master or crew; by enemies, pirates or robbers; by arrest or restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, provided, the owners have exercised due diligence to make the steamer seaworthy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value.

General average payable according to York-Antwerp Rules. If the owner of the steamer shall have exercised due diligence to make said steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed, that in case of danger, damage or disaster, resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the steamer, or from latent or other defects, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contributions in General Average, or for any special charges incurred, but, with shipowner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

2. That this shipment until delivery at the port (B) second above mentioned, is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act Relating to the Navigation of Vessels, Etc."

3. That the value of each package receipted for as above, does not exceed the sum of one hundred dollars, unless otherwise stated herein, on which basis, the rate of freight is adjusted.

4. That the carrier shall not be liable for articles specified in Section 4281 of the Revised Statutes of the United States, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading.

5. That shippers shall be liable for any loss or damage to steamer or cargo, caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed, at any time, without compensation.

6. That the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents.

7. That in case the steamer shall be prevented from reaching her destination by quarantine the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods, shall be a lien thereon.

8. That the steamer may commence discharging immediately upon arrival, and discharge continuously, any custom of the port to the contrary notwithstanding the Collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the steamer by the consignee directly they come to hand in discharging the steamer, the master or steamer's agent to be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the goods shall be deemed delivered, and steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until the payment of all costs and charges so incurred.

9. That if, on a sale of the goods at destination, for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

10. That full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

11. That in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination, on the day of the steamer's entry at the Custom house, less all charges saved, steamer being only responsible for such part of the goods as have been actually delivered to the steamer at the port (A) first above mentioned, and steamer not liable for any loss or damage that may have occurred before such delivery, while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port (A) first above mentioned.

12. That merchandise on wharf awaiting shipment or delivery, be at shipper's risk of loss or damage, not happening through the fault or negligence of the owner, master, agent, or manager of the steamer, any custom of the port to the contrary notwithstanding.

13. That this bill of lading, duly endorsed, be given up to the steamer's consignee in exchange for delivery order.

14. That freight prepaid will not be returned, goods lost or not lost.

15. That parcels for different consignees collected or made up in single packages addressed to one consignee, pay full freight on each parcel.

16. That freight payable on weight, is to be paid on gross weight landed from ocean steamer, unless otherwise agreed to, or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight, but inland freight and charges paid on wheat, peas, maize or other grain or seed, or other bulk articles, from point of shipment to seaboard, shall be paid by consignee at destination on the weight delivered on board ocean steamer.

17. It is stipulated, that, in case the whole or any part of the article specified herein be prevented by any cause from going in the first steamer leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeeding steamers employed in the steamship line, or if deemed necessary by said carrier, it may forward them in other steamers.

18. That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the Steamship Company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

19. That if the goods are destined beyond the port (B) second above mentioned, the transhipment to connecting carrier shall be at the risk of the owner of the goods, but at steamer's expense, and that all liability of the Steamship Company hereunder terminates on due delivery to connecting carrier.

III.—With respect to the service after delivery at the port (B) second above mentioned, and until delivery at ultimate destination, if destined beyond that port, it is agreed that:—

1. In case the regular steamship service to final port of delivery, for any reason be suspended or interrupted, the carrier, at the option of the owner or consignee of the goods, or the holder of the bill of lading, may forward the goods to the nearest available port, this to be considered a final delivery; or to store them at the port (B) second above mentioned, at the risk and expense of the goods, until regular service to final port of destination is opened again.

2. That the property shall be subject exclusively to all the conditions of the carrier or carriers completing the transit; the duty of notification above provided for shall fall exclusively within the obligation of the carrier completing the transit, and no prior carrier shall be responsible for the fulfillment of that obligation.

And Finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading, agree to be bound by all of its obligations, exceptions and conditions whether written or printed, as attested by the signature of shipper or representative signing in behalf of shipper.

[fol. 22] W. E. MARTIN, a witness called in behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. Were you the agent at Earle, Arkansas, at the time the shipment in question was made or started to be made?
A. Yes, sir.
Q. You are still in the employ of the company, are you?
A. Yes, sir.
Q. You are now at Forrest City?
A. Yes, sir.
Q. How long had you been agent at Earle at the time this shipment occurred?
A. Something like four weeks.
Q. And you remained agent there for sometime afterwards?
A. About two weeks afterwards.
Q. How long have you been an agent in that cotton territory there for the Missouri Pacific?
A. At what point?
Q. Any of those points?
A. I have been there since 1909—I have been in that cotton territory.
Q. As agent?
[fol. 23] A. As agent at different points.
Q. For the Missouri Pacific Railroad Company?
A. Yes, sir.
Q. I suppose you have made many shipments for the company?
A. Yes, a good many.
Q. Some of them export and some interstate shipments?
A. Yes, sir; both kinds.
Q. Now at the time this bill of lading was issued and signed by you—I believe the cotton was put on cars and was burned up after it was reduced in the compress?
A. Yes, sir.
Q. And the cotton was burned in connection with a car that it was on before you could take it out?
A. Yes, sir.
Q. It was 75 bales of cotton?
A. Yes, sir.
Q. As shown by the bill of lading?
A. Yes, sir.
Q. Do you know anything about the kind of cotton it was?
A. No, sir; I don't know.
Q. You remember it was an export shipment, of course?
A. Yes, sir.
Q. Mr. Martin, I know that you are the agent of the railroad company, but I had you subpenaed here because I want to ask you some [fol. 24] questions. Who was it that you—that presented this bill of lading for your signature and offered this cotton for shipment?

A. Well, I don't know that I could give you the exact name, but it was someone in connection with the Earle compress.

Q. Was it Mr. Hurley?

A. I am not sure who presented the bill of lading.

Q. Well, it seems as a matter of fact that it was Mr. Hurley?

A. He was interested in the compress at that time.

Q. He represented the shipper in having you issue this bill of lading, as I understand it. Now, what conversation occurred between you and him in regard to issuing this bill of lading, if any, about what would be the rate on the cotton?

A. There was none that I remember of.

Q. None whatever?

A. No, sir.

Q. Did you say anything to him about what rate would be charged?

A. No, sir.

Q. Did you say anything to him about the kind of bill of lading you would issue to him—with regard to the exemptions from liability or such as that?

[fol. 25] A. The bill of lading was already made out when it was presented to me.

Q. It was a bill of lading in use by the Missouri Pacific Railroad Company, wasn't it?

A. Oh, yes.

Q. That bill of lading was a regular export bill of lading that was issued?

A. Yes, sir; the prescribed form we were using on this date.

Q. You had to use that form did you not?

A. Yes, sir.

Q. You had no other form to use, did you?

A. Well, I am not sure about that.

Q. Well, in regard to the rate. Do you remember what the specific rate was that was on file in your office on cotton to Brunswick, Georgia?

A. No, sir; I don't remember the exact rate.

Q. Did you have anything but that one specified rate for the purpose of the rate schedule?

A. I don't know because the rates were in the bill of lading and we only compared the rates in the bill of lading as to the inland rate and the ocean rate as quoted by Mr. McWilliams' office.

Q. Where do you get the inland rate?

A. From the tariff. I can give you the I. C. C. number. Tariff No. 215, the regular cotton tariff.

Q. In use at that time?

[fol. 26] A. Yes, sir.

Q. And in force at that time?

A. Yes, sir.

Q. You took that from the specified rate—that showed the rate to each point?

A. Yes, sir.

Q. And you got the Brunswick rate by summung up the other rates?

A. Yes, sir.

Q. You say you had the regular cotton tariff on file in your office?

A. Yes, sir.

Q. What else did you have in the way of rates, schedules or classifications on file in your office, if anything?

A. Well, we had a good many tariffs on file especially the classifications—No. 1.

Q. That was in force at that time?

A. If I am not mistaken they were in force at that time.

Q. The question I asked you was—you had them on file in your office at that time?

A. Yes, sir.

Q. Now, in the rules that are published in connection with cotton schedules in force at that time I saw a rule which prescribes the form of bill of lading that you were to use. I want to introduce this. It is [fol. 27] at page 39 of the schedules which seems to have been in force, under the head of rules and regulations. I will read that into the record. Is that the cotton tariff?

A. Yes, 215 is all right, but I don't know about the circular letter after that because it is dated July 1, 1920.

Q. Look at that and see if that was in force at that time? (Hands paper to witness.)

A. Well, I couldn't say.

Q. Can't you look at that further back there and see whether it was in force or not?

A. No, sir; I don't know what date this was cancelled. It might have been cancelled several days later, because I didn't keep any record of the tariff that was filed at that time. I knew it was a cotton tariff. It was re-issued quite often.

Q. If it was cancelled several days later it wouldn't affect this shipment?

A. But if it was cancelled before this shipment it would.

Q. Can you look at this and tell whether this was cancelled or not?

A. No, sir.

Mr. Wiley: May be I can tell you. Let me see it. (Hands to Mr. Wiley) No. 215-H is all right.

Mr. Marshall: If that is the tariff sheet that was in force at that [fol. 28] time with the rules and regulations published therein, I want to read into the record the rule that prescribes the bill of lading to be used.

Mr. Wiley: All right—what one are you reading?

Mr. Marshall: "C" and "D" on Page 39.

(Thereupon, Mr. Marshall read from Mo-Pac Freight Tariff No. 215-H, as follows:

130. Bills of Lading. "C." Foreign bill- of lading are to be used for Cotton Linters consi*d*ered to other destinations than on

the American Continent, that is, England, Germany, France, etc. The present form of Foreign Bill of Lading is No. 1168-M and 1168½ M. "D." All bills of lading must be free from alterations or erasures, except as provided for in Item No. 115, and must contain a correct description of the Cotton or Cotton Linters, covered including marks, quantity, conditions, etc.

Mr. Marshall: Item No. 115 which is referred to there at the bottom of Page 38, and is as follows:

"115. Acceptance and condition of Cotton and Cotton Linters. "a." When Cotton or Cotton Linters are offered for shipment at stations, on cotton or depot platforms, or placed in cars available for loading, agents must carefully examine same and if any damage such as rotten or torn bagging, missing or broken bands, muddy, wet, stained or dirty, cow-eaten, or other specific damage, exception must be made on original and duplicate bills of lading, clearly defining the character of the damage, and the extent thereof so far as it is possible to do this; this same rule to govern on conductors receipts when cotton is received at other than regular agency stations. [fol. 29] "b." Agents are prohibited from permitting shipments of cotton or Cotton Linters being placed on company's platform or premises, unless properly marked and accompanied by necessary shipping instructions."

Q. That rule provides that you shall use No. 1168-M and 1168½-M, and the bill of lading which you issued shows this number——

A. Yes, 1168½-M.

Q. That is correct, is it.

A. Yes, sir.

Q. Now, the other bill of lading which you were authorized to issue was 1168½-M. I have a copy of that bill of lading here. I would like for you to state if you can tell whether that is the same bill of lading as the other except that has a different print, and is all on one page instead of both pages?

Mr. Wiley: I object to that.

Mr. Marshall: I will prove that. I asked him if he can say.

Reporter: You made a mistake in your other question unless they were both 1168½-M.

Mr. Marshall: No, one is 1168-M and the other is 1168½-M.

Q. Do you know any difference between those two bills of lading?

A. I think you will find that one is the original and the other one is a copy—not negotiable. 1168-M is the original lading and 1168½ M is a copy—not negotiable stamped across it.

[fol. 30] Q. Then they are the same with that difference?

A. Yes, sir.

Q. That, you say, is the bill of lading you were authorized to issue. Do you ever write anything on these cotton bills of lading showing a different rate or making a different bill of lading out of it?

A. Not if the rate compared with what I checked with the published tariff rate; if it is different we make out a new lading.

Q. Well, you made out a new bill of lading entirely?

A. Yes, sir.

Q. You don't understand me—You are talking about the bill of lading the shipper made out for you?

A. Yes, sir.

Q. I want to know if you ever change those bills of lading such as you issued in this case—whether you change them by writing or stamping anything on them. That's the kind you were issuing on cotton all that time, you said?

A. Yes, sir.

Q. How many shipments of cotton do you suppose you made in that territory during—along the period of time you have been there?

A. Well, I couldn't estimate it.

Q. It would run up into the thousands, wouldn't it?

A. Yes, both domestic and foreign.

Q. Tens of thousands. Did you ever during that time change a bill of lading that was furnished you by the company by writing [fol. 31] anything on it showing a different rate or something like that? Did you have any stamp by which you could change them into a different bill of lading?

A. Well, there was a good many stamps but whether there was applied on that I couldn't say.

Q. You mean stamps with names and dates and such as that?

A. Yes, but whether we had one for what you spoke of, I couldn't say.

Q. Suppose a man had come there and had wanted to ship this cotton on a different bill of lading, what would you have done? Could you have furnished him with a different bill of lading than this?

A. Yes, sir.

Q. How could you do it?

A. By a clause in the official classification.

Q. Well, how would you do it?

A. Well, I don't know just how without looking at the clause in the classification.

Q. Did you ever do that?

A. No, sir; I never have.

Q. You don't know whether you had any stamp to do it with or not?

A. No, sir; I don't.

Q. You never did write anything of that kind on a bill of lading? [fol. 32] A. I never have written anything on them.

Q. Well, you were directed to use on bill of lading by the rule there. Why do you say you could issue a different bill of lading?

A. Because the official classification No. 1 says you can do so.

Q. The other rule says you can't do so?

Mr. Wiley: I object to that.

Mr. Marshall: I want to see what explanation the witness makes

of that. As I construe it here you are required by the cotton schedule of rules published to issue the one bill of lading—you are prohibited from putting anything on it at all except where the cotton is damaged. If that was the case how could you make a different bill of lading out of it?

A. Well, I can't explain.

Q. You can't explain that at all?

A. Take the official classification and each rule and regulation——

Q. If a man had demanded a different kind of a bill of lading, you don't know you could have issued it to him, do you?

A. Yes, I would have turned there and issued it like the official classifications specified.

Q. Could you have done that without advice from somebody higher up in the business?

A. No, sir; I wouldn't have wanted it.

Q. You would have wanted to get directions from somebody higher up before you do it?

A. Yes, in this case I would.

[fol. 33] Q. You would have done that?

A. Yes, I would if it was requested for the change to be made.

Q. Did you ever tell any shipper in the tens of thousands shipments you have made there that there was a higher rate and that they could get a different liability and a different bill of lading?

A. No, sir.

Mr. Wiley: I object to the question. I don't think it is material at all.

Mr. Marshall: I think it is. It will be for the Court to say.

Court: I don't see that it is material in this case whether he told them that or not.

Q. Did you ever know of any shipments being made in that territory during the time you have stated, except on these regular bills of lading without anything written on them?

A. Yes, all I have ever issued is the regular bill of lading.

Q. If you had been issuing a bill of lading for a shipment that ended at Brunswick, Georgia, from Earle, Arkansas, would you have used that same rate—that same specified rate that you did use in the case of this export shipment?

A. I am not sure about that, but I think there was a ship side delivery charge of probably four cents—otherwise we would have used the same rate.

[fol. 34] Q. That is independent of the regular rate?

A. Yes, sir.

Q. If you had been shipping an interstate shipment that ended at Brunswick, Georgia, I say would you have used this same schedule of rates on cotton that you did use for the export shipment?

A. The rate that is published in the tariff.

Q. In other words you didn't have any rate published—any specific rate except that, and you used it for both classes of shipments.

A. Yes, sir.

Q. Do you know or can you state whether your interstate bill of lading had an exemption of this kind in it at that time?

A. You mean domestic bill of lading?

Q. Yes, anywhere in the United States?

A. No, sir; I cannot——

Q. Well, as a matter of fact it couldn't have had it in it because the law prevented it. You never read over the conditions in this bill of lading much yourself, I don't suppose?

A. No, sir; I haven't read them all.

Q. You don't have much to do with that. I suppose you have received a great many shipments going to foreign ports during the time you have served there?

[fol. 35] A. At Earle?

Q. Yes, and at any other place?

A. Yes, I have received a good many at different points, but very few at Earle.

Q. This particular bill of lading is what is called a shipper's order bill of lading and provides for notification of some firm at Liverpool. You understand the effect of that kind of bill of lading?

A. Yes, sir.

Q. You understand that that kind of bill of lading is for cotton that has been contracted to be sold over there before it is shipped?

Mr. Wiley: I object to that.

Court: Don't answer that question.

Mr. Marshall: My question was if he understood that a shipment to shipper's order that have the provision for notice of a certain party at the destination—if he understood that that shipment meant that the property had been contracted to be sold prior to the shipment.

Court: What are you attempting to show by that?

Mr. Marshall: My object is to show that they had notice that the cotton had been sold and what the loss would be.

Court: I think you should show when the cotton had been sold to someone in Liverpool that it is the custom to ship it that way. Make it a question if what is the custom and practice of shipping.

Q. You may state that?

A. Just how was the question?

Q. Don't you understand that that was the rule or the custom?

[fol 36] A. I don't know it was sold or to be sold—I couldn't say.

Q. I will ask you again—if that wasn't the custom in shipments of that kind, where cotton had been sold to Liverpool people—if it wasn't the custom to ship it that way?

Mr. Wiley: I object.

Witness: Well, yes. It is the custom to ship this export cotton shipper's order notify.

Mr. Wiley: Save my exceptions.

Q. That's the way it is shipped. Now, I want to know if that doesn't indicate to your mind that the cotton had been sold?

Mr. Wiley: I object and save my exceptions.

Q. I mean to factories or somebody over there, or it wouldn't have been shipped that way.

A. It would indicate that it was sold or was going to be or it wouldn't be shipped.

Q Do they ship cotton to Liverpool and sell it after it gets there?

A. I couldn't say—I don't know.

Q There is not much spot market in Liverpool.

A. I don't know—I couldn't say about that.

Q. I was trying to find out if that kind of a shipment didn't indicate to your mind that the cotton had been bought here for sale and had been sold to people who would use it over on the other side?

A. Yes, it would indicate that.

[fol. 37] Mr. Wiley: Save my exceptions to that.

Q. You are not a practical cotton man and you don't know very much about markets and so forth?

A. No, sir, I don't.

Cross-examination.

By Mr. Wiley:

Q. Mr. Martin, you don't know anything about the custom of shippers, or how or when they sell their cotton in Liverpool, do you?

A. No, sir.

Q. That doesn't come within your line of work?

A. No, sir; it doesn't enter it.

Q. The mere fact that cotton is billed shipper's order notify somebody in Liverpool—I mean cotton that is offered for shipment from Arkansas to Liverpool, doesn't mean one way or the other to you whether or not it has been sold or is to be sold, or what else is going to be done with it?

A. You mean when I am signing the bill of lading?

Q. Yes.

A. No, sir.

Q. The original bill of lading has been introduced in evidence here as Exhibit "B" and is No. 1168-M. Now, you stated, I believe, on direct examination that the 1168½-M was merely a copy of that. Now, state whether or not the document which I hand you now is a copy of the bill of lading which has been introduced [fol. 38] in evidence here. (Hands paper to witness.)

A. It is 1168½ copy.

Q. Is that a copy of the bill of lading made by you at that time?

A. I didn't make the copy.

Q. I mean signed by you at that time?

A. Yes, sir; it is.

Q. Now, Mr. Martin, you have stated that you had on file this freight cotton tariff which was in effect at that time, and which

was read to you by Mr. Marshall, in your office. You had also on file consolidated freight classification No. 1 of which this is a copy?
A. Yes, sir.

Mr. Marshall: You are going to make him your own witness for that, are you?
Mr. Wiley: No, sir; I am going to examine him on what you examined him. He said under this consolidation he would have done certain things if he had been requested.
Court: Go ahead—it don't make any difference.

Q. You said on direct examination if you had been requested by this shipper to give a different bill of lading from the one you gave you would have followed the rules laid down in the consolidated freight classification?
A. Yes, sir.
Q. Now, what rule was it that you would have followed.
A. This rule No. 1.
[fol. 39] Q. See if you can find it in there? (Hands book to witness)
[fol. 39] A. Yes, it is rule No. 1.
Q. It is rule No. 1, Page No. 1 of the Consolidated Freight Tariff?
A. Yes, sir.

Mr. Wiley: I want to read that into the record.
Mr. Marshall: Couldn't you just offer it now?
Mr. Wiley: No, I want to read it—I want the Court to hear it. I might as well read it now as any other time.

(Thereupon Mr. Wiley read into the record the following extract from Consolidated Freight Classification No. 1, issued December 10, 1919:)

Consolidated Freight Classification Number 1, Publishing the Ratings, Rules, and Regulations of the Official Southern and Western Classifications

Unless otherwise provided therein, the following are the Rules of the Official Classification, the Southern Classification and the Western Classification.

Rule 1

Articles Classified Subject or not Subject to Uniform Bill of Lading Conditions

Section 1. Applicable to the Official Classification and Western Classification:

"a." Unless other- provided, when property is transported subject to the provisions of the Official Classification and the Western Classification, or either of them, the acceptance and use are required, [fol. 40] respectively, of the "Uniform Bill of Lading," "Straight"

or "Order", (pages 40 to 43 inclusive) or the carrier's Export Bill of Lading.

"b." In order that the consignor may have the option of shipping property, either subject to the terms and conditions of the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be, hereinafter set forth, or under the liability imposed upon common carriers by the common law and the Federal and State statutes applicable thereto, the Official Classification and the Western Classification provide for different rates and for different forms of Bills of Lading to be used, respectively, as the consignor may elect to have a limited liability or a common carrier's liability service.

"c." Unless otherwise provided in this Classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of the Uniform Bill of Lading (see pages 40 to 43 inclusive) or the carrier's Export Bill of Lading, as the case may [fol. 41] be. If consignor elects not to accept all the terms and conditions of the Uniform Bill of Lading, or the carrier's Export Bill of Lading, as the case may be, he should so notify the agent of the forwarding carrier the agent at the time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of the Uniform Bill of Lading, or the carrier's Export Bill of Lading, as the case may be, in order to secure the reduced rate.

"d." Property carried not subject to all the terms and conditions of the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be, will be carried at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be ten per cent (10%) higher subject to a minimum increase of one (1) cent per one hundred pounds) than [fol. 42] the rate charged for property shipped subject to all the terms and conditions of the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be.

"e." When the consignor gives notice to the agent of the forwarding carrier that he elects not to accept all the terms and conditions of the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be, but desires a common carrier's liability service at the higher rate charged for that service the carrier must print, write or stamp upon the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be, a clause signed by the agent reading: "In consideration of the higher rate charge, the property herein described will be carried at the carrier's liability, limited only as provided by law, but subject to the terms and conditions of the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability."

"f." The cost of insurance against marine risk will not be assumed by carriers unless specially provided for in tariffs.

"g." For Export Bill of Lading of Official classification carriers [fol. 43] see pages 44 to 46, inclusive. The Export Bills of Lading of Western Classification carriers are the forms individually adopted by such carriers."

Q. You testified on direct examination that you would proceed under that rule had you been requested to ship at common carrier's liability, is that correct?

A. Yes, sir, at the time of the presentation of the bill of lading.

Q. Were you notified by this shipper or by anybody for him, that the shipper in this shipment elected to ship not subject to all the terms and conditions of the common carrier's Export Bill of Lading?

A. No, sir; I don't think I was.

Q. What?

A. No, sir.

Q. You were not?

A. No, sir.

Q. You know whether you were or not?

A. No, sir; there was nothing said about the conditions of the bill of lading at the time of signing it.

Q. I hand you Exhibit "B" being the original bill of lading introduced by the plaintiff. Tell the court how that bill of lading was made out,

[fol. 44] or rather where you got it and how—what was on it when you got it?

Mr. Marshall: I don't think that is material. It is just taking up time—It don't matter who made it out. It was signed. We have an agreement that eliminates that.

Court: He has already testified that it was made out when it was brought to him. Go ahead Mr. Wiley.

Witness: You want to know what I added to the bill of lading after it was presented to me?

Q. Yes.

A. We put a number on the bill of lading.

Q. What is that number?

A. "E-1," Contract No. "MPA 69," and car number "SAAP 7952," and the signature.

Q. Whose signature?

A. My signature.

Q. Was any other part of the bill of lading actually made out by the carrier's agent?

A. The cashier's receipt—the cashier signed for the cash obtained, as his name appears for the transportation of the shipment.

Q. That has his name on the face of the shipment?

A. Yes, sir; J. A. Kelley.

Q. Outside of what you have stated the bill of lading was all made out and signed by the shipper before the carrier got it at all?
A. Yes, sir.
Q. Where was this cotton before it was received by the carrier?
[fol. 45] A. In the compress—in the Earle compress.
Q. Where are Porter, Weaver & Company, the plaintiffs in this case located?
A. I am unable to say.
Q. They are not at Earle, Arkansas, are they?
A. No, sir.

Witness excused.

[fol. 46] B. H. BURKE, a witness in behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. What is your name?
A. B. H. Burke.
Q. What business are you in?
A. I am in the freight traffic business—public traffic manager.
Q. You have been connected with that concern for a number of years, I believe, in Little Rock?
A. Yes, sir; several years.
Q. I believe you are at the head of it now since the death of Mr. McDonald?
A. Yes, sir.
Q. Your firm has had charge of the settlement of this claim for Porter, Weaver & Company, has it not?
A. Yes, sir.
Q. You are thoroughly familiar with the details of it, I suppose—as far as they come to your attention there?
A. Yes, sir.
Q. Before you entered the public traffic business, I will ask you what business you were engaged in?
A. Well, for about twelve years before this I was with the Missouri Pacific—four years in the Traffic Department and the [fol. 47] balance of it in the Transportation Department.
Q. Have you become thoroughly familiar with the rules of shipping, the rate sheets and classifications and everything of that kind in that line of business?
A. Yes, sir.
Q. I will ask you what the specified rate on cotton from Earle to Brunswick was at the time of this shipment as shown by the rate sheets? (Hands witness tariff.)

Mr. Wiley: Now, Marshall, of course this witness doesn't know that.

Mr. Marshall: He is familiar with the rates all over the country.
Mr. Wiley: I don't know whether that is the authorized tariff.
Mr. Marshall: We have a stipuplation covering it. He is going to say this is the official tariff in force at that time. Can you state that?

A. Absolutely.
Q. It has been filed with the Interstate Commerce Commission.
A. It has got that on it there, I think.

Mr. Wiley: How do you know it was filed?

A. Because there was supplements filed after—long after this in here moved. It carries their number and signed by the Missouri Pacific Freight Traffic——

Thereupon it was agreed by and between counsel for respective [fol. 48] parties that the tariff above referred to being Freight Tariff or Local, Joint and Proportional Rates, Rules and Regulations, Mo. Pac. No. 215-H, Cancels No. 215-G, on Cotton and Cotton Linters from points in Arkansas, and other States, to Points in the United States and Dominion of Canada, I. C. C. No. A-4530 was in force at the time of the shipment in question.

Q. Now, refer to that and see what the rate was from Earle, Arkansas, to Brunswick, Georgia, at the time this shipment was made?
A. The rate is 98½ cents. That is what it shows on the bill of lading.
Q. That's the specified rate provided for at that time on that shipment of cotton?
A. Yes, sir.
Q. Before I pass that—was there any different rate for an interstate shipment which would end—which would begin at Earle and end at Brunswick?
A. No, sir; there is only one rate in there. There is a charge there for handling on ship side for export, and that is in addition to the one rate—there is only one rate to Brunswick.
Q. Then there is only one scheduled rate for either export or interstate shipment from Earle to Brunswick?
A. Yes, sir.
Q. Can you state whether the interstate bill of lading from Earle to Brunswick had any exemptions in it?
[fol. 49] A. You mean the domestic?
Q. Yes.
A. Well, no, I can't state positively.
Q. We can introduce this and show it later. Now, then if there is an exemption in the inland part of an export shipment from loss by fire, it is an exemption—it is discrimination between that kind of a shipment over the same lines, and a domestic shipment?

Mr. Wiley: I object to that.
Court: Yes, that is objectionable.

Witness: There is only one rate, Mr. Marshall.

Q. Well, that's a fact, I think. I wanted to make it plain. Well, it has been contended here that there is a rule in the Consolidated Freight Classification No. 1 that bears upon this shipment of cotton. I want you to take the freight tariff on cotton which has been referred to, and state whether that is under the control of that rule in the freight classification—under the provisions of the freight tariff itself, which you have in hand.

A. I have in my hand Missouri Pacific Tariff No. 215-H which has been referred to here. It states on the title page, "Governed, except as otherwise provided herein, by the Consolidated Freight Classification No. 1." Now, provided herein on Page 39 under Rules [fol. 50] and Regulations, which is the same head as Rule 1, there is a rule under "Bill of Lading" which specifically states that on Cotton for export use Missouri Pacific Bill of Lading No. 1168½-M. It further states that all bills of lading must be free from alterations except as provided in Item No. 115. That has to do with the condition of the cotton.

The Court: That has free from alteration?

Witness: Alterations or erasures.

Q. Is that Form 115?

A. 115 has to do with the condition of the cotton. I read that awhile ago. That has to do with the writing on it; the quality of the cotton and the damage of it.

Mr. Wiley: I object to the witness giving his construction of that rule.

Court: I think that is correct. Let him state the facts.

Mr. Marshall: These classifications and rules are so complicated we will have to have the assistance of other people who are familiar with this line of business. That's the reason I asked him the question and he answered it as an expert.

Court: Let him answer.

Q. If you didn't finish your answer you might finish it?

A. I might have construed that question too broad. I thought you asked me—Read his question to me. I might have talked too much.

Q. No, I think not.

[fol. 51] A. I started to say that under the provisions of the tariff, Rule 1 in the official classification has nothing to do with cotton. It absolutely states—I think any traffic man will make the same—give the same opinion, inasmuch as these specific forms of bill of lading are prescribed.

Q. You are familiar with all the different forms of bills of lading, I suppose?

A. Well, fairly familiar, yes.

Q. I want to introduce, because I think it has a bearing on it, the present bill of lading in use both for interstate and foreign shipments. I will ask you this—Is the rate for interstate and export

from Earle to Brunswick the same now as both of those classes of shipments?

Mr. Wiley: I object to that.

Court: No, we are interested in what the rate was at the time of the shipment.

Mr. Marshall: I want to show that they used the same rate for both kinds of shipments. I am going into the rate business and show what the rate is, but I think I might be allowed to state that——

Court: He said that at the time of the shipment that there was just one shipment.

Q. Rule 1 which has been read here as having a bearing upon this shipment, provides that the carrier, under certain circumstances, shall issue what they call the carriers export bill of lading. Do you understand that that export bill of lading was adopted by the Inter-[fol. 52] state Commerce Commission, or it was just a bill of lading put in force by the carrier.

A. At the time of this shipment?

Q. Yes, at the time of this shipment.

Mr. Wiley: I object to that. That's a construction by this witness on this bill of lading. It seems to me to be a question for the Court. The rule has been read and Mr. Marshall's witness has stated that this was the bill of lading adopted by the carrier, and he has also introduced the fact in evidence that the bill of lading provided by the carrier was specified.

Court: Yes, I believe he said he didn't think it applied to cotton shipments—Rule 1. I would like to know why?

A. Did I say it didn't apply? I mean I didn't think it was ever intended to apply.

Mr. Wiley: Save my exceptions to that testimony. I don't think it is competent.

Court: I don't think so. He simply stated he didn't think it was intended to apply. The objection is sustained as far as him expressing an opinion in the way he did.

Mr. Marshall: Well, but you don't object to his statement—in giving quotations from the schedule showing why it did not.

Court: No.

No cross-examination.

Witness excused.

[fol. 53] Edmond McGehee, a witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. What position do you hold with Porter, Weaver & Company.

A. I am the office manager.

Q. You are familiar with this cotton and the loss of it—the shipment that was attempted to be made?

A. Yes, sir.

Q. You might explain if you are a large shipper of cotton?

A. Yes, sir, Porter, Weaver & Company have been shipping cotton over thirty years.

Q. You have been connected with the shipping department yourself?

A. Yes, sir.

Q. Are you familiar with the rates, and the bill of lading under which those shipments were made, both the domestic and export shipments?

A. Well, it is not my position to keep uo with those. We have a rate clerk that keeps up with the rates.

Q. I am speaking in a general way?

A. I have a general idea of them, yes.

Q. Have you ever been in your shipments of cotton at any time been advised of their having two different rates from Earle, Arkansas, to Brunswick, Georgia, or from any other point to other [fol. 54] port for foreign shipments.

A. No, sir; I never shipped any that way and never was advised to that effect.

Q. You have always shipped under one rate and one bill of lading?

A. One bill of lading.

Q. Did you ever hear of such a thing as a changed bill of lading by writing or stamping on it to make another bill of lading out of it?

A. No, sir; I never heard of it until here.

Mr. Wiley: I object to that and move it be excluded.

Mr. Marshall: I would rather for the Court not to pass on that. We want to make up a record, and we are not trying it before a jury.

Q. And you haven't during the thirty years that you have been making shipments—you have never heard of any such optional rate as that being furnished by the railroad?

A. We have never used it. We just used the ordinary bill of lading for export that the railroads always issued, and never asked for anything else.

Q. They always put in them the specified rate that has been published?

A. We always used them—use the published rate.

Q. Did you ever hear of them making up a rate by adding ten per cent to the other rate as was stated here?

[fol. 55] A. No, sir; except what I have heard here.

Q. This was the first time and you have been shipping cotton for thirty years?

A. Yes, sir.

Q. How many shipments do you suppose you have made?

A. That would be hard to say. We average anywhere from thirty-five to sixty or sixty-five thousand bales of cotton a year.

Q. That many bales of cotton involved a great many bills of lading?

A. Yes, sir, foreign and domestic.

Q. Who was it that attended to the shipment of this cotton at Earle for your firm?

A. Farnsworth Evans & Company.

Q. Do you know who their agent was that represented them in doing so?

A. No, sir, only through hearsay.

Q. You understand it was Mr. Hulsey, who has been referred to here?

A. Yes, sir.

Q. And Farnsworth Evans & Company—who are they?

A. They are cotton buyers in Memphis.

Q. You might state whether you bought this cotton from them intending to ship it abroad?

A. Yes, sir we did.

Q. I want you to state just what the arrangement was about shipping this cotton and whether you had a contract for the sale of it [fol. 56] to parties in Liverpool, and whether you made up an invoice at the time of the cotton—at the time the bill of lading was obtained?

A. Yes, sir; we sold the cotton to Liverpool. I think it was June 17th, and on the same day we purchased it from Farnsworth Evans & Company to be shipped as we wanted it. I think we sold the cotton to be delivered in Liverpool in January, and failing to do so we were to accept the price of the cotton at that time—at the valuation of the cotton at that time in Liverpool.

Q. I will ask you if he paper I show you is an invoice that was made out at the time for that shipment? (Hands paper to witness.)

A. Yes, sir; that's the invoice of Farnsworth Evans & Company.

Q. From them?

A. From them to us—Porter Weaver & Company.

Mr. Wiley: Let me see it. (Hands to Mr. Wiley.) I object to that and reserve the right to move to exclude it, Your Honor.

Mr. Marshall: That's all right. We can determine that hereafter.

Court: On what ground do you object?

Mr. Wiley: Because it shows on its face and also by the testimony of the witness that this is an invoice of the cotton as of June 17, 1920, whereas the carrier received this cotton October 21, 1920, and this can have no bearing whatever on the value that the carrier would be liable for.

Court: Let it be admitted.

[fol. 57] Mr. Wiley: Save my exceptions.

(To which ruling of the Court the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

(The above invoice was here introduced in evidence, read to the Court, marked as Exhibit "C" and is as follows:)

EXHIBIT "C" TO TESTIMONY OF EDMOND McGEHEE

No. 48. Copy

Invoice of 75 Bales Cotton Shipped by Farnsworth-Evans Co.

Memphis, Tenn., Oct. 22nd, 1920.

From Earle, Ark., to W. H. Midwood & Co., Cotton Exchange Bldg., Liverpool, England.
Via Mo. Pac. R. R.
For account of Porter, Weaver & Company.
Applied on order #507, June 17th, 1920, from Porter, Weaver & Co.
Grade: Fully mid. to good mid. staple Warren.

PKIN 75 B/c 39955# @ 4.40¢	$16,541.37
Less Difference in Freight @ 23¢	93.89
	$16,447.48
Add—	
Freight Prepaid @ $2.93½	1,172.68
Patching 43¢	32.25
	$17,652.41

Reimbursement

By our draft to order of local check.
E. & O. E.

[fol. 58] Q. This shows the invoice of 75 bales of cotton October 22, 1920. I believe you said it was $17,652.41. Is that what you paid for the cotton?
A. Yes, sir.
Q. I believe this freight that was prepaid was afterwards paid back, wasn't it?
A. Yes, sir; the Arkansas Traffic Assn.—they paid that freight to them and they refunded it to us a year or more or less——
Q. That would come out of that then?
A. Yes, it is marked reimbursement by the local agent.
Q. I have here another invoice which seems to be an invoice of Porter-Weaver & Company. I will ask you if that is your invoice for the shipment? (Hands paper to witness.)
A. Yes, sir, that's the invoice and shows the amount for which we drew on them for the cotton.

Mr. Wiley: I object to that, Your Honor. That's not the proper way to prove the value of the cotton.
Court: It will be admitted just the same as the other.

(To which ruling of the Court the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

Q. This invoice shows the sale that was contracted for by the Liverpool parties?

A. Yes, sir, that's the date of the sale and the sale number.

[fol. 59] (The above invoice was here introduced in evidence, read to the Court, marked as Exhibit "D" and is as follows:)

EXHIBIT No. "D" TO TESTIMONY OF EDMOND McGEHEE

Invoice No. 6 of 75 bales cotton bought by Porter, Weaver & Co., Memphis, Tenn., for account of R. L. Overton & Co., a/c W. H. Midwood & Co., and Shipped to Liverpool, Oct. 21st, 1920, via Mo. Pac. Brunswick, Ga. Leyland Line.

Ordered by R. L. O & Co.
Date of Order: #3 6/17/20. 19—.
At — points on —— @ ——.
P. W & Co.

PKIN/FG. 75 B. C. 39,955 lbs.
2,397 " 6% 37558 @ 3001d. 1127116d.
Less freight on —— lbs. @ d. per 100 lbs.

Reimbursement

By our 60 days' draft on London City & Midland Bank Ltd.—4696-6-4.
Through Guaranty Trust Co.

Classification

Freight prepaid through.
E. & O. E.
Memphis, Tenn. Oct. 21st, 1920.

Porter, Weaver & Co.

[fol. 60] Q. That was the price you would have gotten for the cotton if the cotton had been shipped through.

A. Yes, if it was delivered at Liverpool.

Q. Now, what was the rate of exchange at that time between——

A. The rate of exchange at the time that was drawn was 392¼.

Q. That would reduce that to American money at that time?

A. Yes, sir.

Q. And the loss that Porter-Weaver Company suffered would be what?

A. The loss that Porter-Weaver Company suffered would be—— We contend the invoice valuation of the cotton.

Q. That is what you would have gotten if it hadn't been destroyed?

A. Yes, sir.

Q. That is shown in the invoice that was last introduced?

A. Yes, sir.

Q. This invoice from Farnsworth Evans Company to your firm shows that the cotton was fully middling to good middling, staple Warren. What does that word Warren mean?

A. Warren is a type that Farnsworth-Evans Company use in the sale of cotton.

[fol. 61] Q. Does that refer to the length of the staple?

A. Well, it does—Different buyers have different types or marks on which they sell cotton. They are the only ones that know what they call that staple.

Q. What was the length of this staple?

A. Our mark for it was Pekin, which was one and one-sixteenth inch staple. That is the Warren type is equal to what we call our Pekin type.

Q. You say that refers to the staple and it is 1 1/16?

A. Yes, as we call it. There is quite a difference of opinion in grades and staples.

Q. If that cotton was 1 1/16 it would call for a certain price, I suppose. Cotton is governed purely by the staple?

A. Yes, by the staple and grade.

Court: What did you say the grade was?

A. Fully middling to good middling.

Q. Can you show positively on that invoice what you lost on it? Can you show what was the value of the cotton in England at the time it was shipped?

A. No, sir; you would have to get an expert witness on that—an expert cotton man to tell what the valuation of the cotton would have been at that time.

Q. Now, this shipment was under shipper's order bill of lading, notify certain parties?

[fol. 62] A. Yes, sir.

Q. What is the character of that shipment as shown by the custom in making all such shipments in order to — whether the cotton was sold or not?

A. Yes, it is customary—It is not customary to ship cotton until it is sold or arrangements made. In some instances you ship cotton export—some firms have their own houses over there, and it is sold after it arrives, but in this particular case it was not.

Q. Then where it is shipped to their own houses over there for subsequent disposition it would not be shipper's order, it would be to the consignee over there?

A. No, you mean where it is shipped to your own house?

Q. Well, where it is shipped to somebody other than the shipper himself?

A. You would have to ship it shipper's order in order to negotiate your papers—to sell your exchange and negotiate your papers in New York.

Q. Will you state the name of the consignee over there in the bill of lading in a case like that?

A. Yes, and notification—notify the party to whom—usually the party to whom the cotton has been sold.

Q. How would you do it if it was shipped to your own house?

A. You would notify whoever was representing you there—the [fol. 63] firm name over there was the same name as the other—You would say notify them, shipper's order, because to draw on them for the cotton you have to sell your exchange in New York, so you have to ship the cotton shipper's order.

Q. Those shipments like this—does that indicate that the cotton has been sold or contracted to be sold?

A. It is already sold. Usually the cotton is sold when you ship it that way, without you are shipping it to your own house on consignment to be sold afterwards.

Q. Would the bill of lading so denote?

A. No, sir.

Q. There would be no difference in that case?

A. No, sir.

Q. So all the shipments are shipper's order?

A. Yes, sir.

Q. You do that for convenience?

A. For convenience and required by the exchange bank in New York and the Bank on which you draw in Liverpool.

Q. As a matter of fact how is cotton usually shipped over there—by the method you adopted here or by a different method? What is the custom in regard to that?

A. Well, it is shipped shipper's order notify the party to whom it is sold.

[fol. 64] Q. I know, but is cotton shipped to this point usually sold or——

A. Yes, it is usually shipped on orders—usually sold on orders.

Q. You say that is not universally the case?

A. Well, there are other houses. Of course, some big exporting houses have their own houses—they probably ship to their own houses over there.

Q. Did you ever ship any cotton that way?

A. Yes, we have our own house—our own man in Liverpool.

Q. Why was this cotton not shipped that way?

A. Because we sold it beforehand. We didn't ship it over there on consignment—we sold it and shipped it as I said before.

Q. What is the difference in the bill of lading when you consign it to your own house and whether you ship it after you have contracted to sell it.

A. None at all.

Q There would be no difference?

A. Except the difference in the notification.

Q. What is the difference in the notification?

A. For instance, our firm over therei n Liverpool is R. L. Overton If shipped on consignment we would ship—make our bill of lading to order—notify R. L. Overton Co. This particular shipment had beeb sold to W. H. Midwood & Company on a specific order [fol. 65] and we shipped it shipper's order notify W. H. Midwood & Co. at Liverpool.

Q. You say that would indicate that the cotton had been contracted to be sold?

A. Yes, sir.

Cross-examination.

By Mr. Wiley:

Q. That wouldn't indicate that that cotton had been sold to anybody who didn't know your firm was over there, would it?

A. This particular cotton?

Q. Yes.

A. Well, anybody that was familiar with the shipping of cotton—all firms in Liverpool would know—would readily see it was a shipment to W. H. Midwood & Company.

Q. Suppose W. H. Midwood was your consigning agent over there, it wouldn't indicate that at all, would it?

A. No, sir. It could indicate that but not necessarily.

Q. Then it would not indicate to anybody who didn't know who your consigning agent was—whether this was a shipment already sold or a shipment on consignment?

A. No, sir; there would be no way for them to know.

Q. This exhibit "D" being your invoice to R. L. Overton Com-
[fol. 66] pany or W. H. Midwood & Company, was an invoice of the sale you had made to them on June 17, 1920, and it was at the price which you had on that date, June 17, 1920, sold them this cotton for?

A. Yes, sir.

Q. It was not an invoice of the price at which you had sold or which anybody had sold that cotton on October 21, 1920?

A. No, sir.

Q. The invoice marked Exhibit "C" of Farnsworth-Evans Company to W. H. Midwood Company, account of Porter-Weaver & Company, was also at the price which you bought from Farnsworth-Evans Company this cotton on June 17, 1920?

A. Yes, sir.

Q. As a matter of fact, on the date this cotton was destroyed by fire, but particularly a few days a little thereafter you could have replaced this cotton by re-purchasing at Earle or Memphis, or in that vicinity, at a generally reduced price from what you had paid for it, couldn't you?

A. There was a decline in the market between June 17th and October 21st, 1920.

Q. How long have you been with the Porter-Weaver Company?

A. Thirty years, a little more than that, 32 years.

Q. They are experienced cotton shippers, aren't they?

[fol. 67] A. Yes, sir.

Q. They had shipped cotton from Memphis and Earle many times before this?

A. From Memphis—they shipped very little from Earle.

Q. They have shipped cotton over the Missouri Pacific Railroad Company frequently, haven't they?

A. Yes, sir.

Q. Where is the bill of lading made up of cotton which Porter-Weaver Company ships?

A. Made in our office.

Q. And from your office it is sent to the carrier's agent at the point where the shipment is to originate, is it?

A. Yes, except in this particular case. In this particular case the bill of lading was made in our office and marked the number of bales and the freight rate was put — it, but not the weight. The weight was put in by Farnsworth-Evans & Company, and not by us. I may be mistaken in that, but I think I am correct.

Q. This bill of lading which has been introduced by the plaintiff as Exhibit "B" for this cotton then was made in your office and sent to the compress at Earle?

A. No, Farnsworth-Evans Company in Memphis.

[fol. 68] Q. Farnsworth-Evans Company then was in Memphis also?

A. Yes, sir; their office is in Memphis—their main office is in Memphis.

Q. Look at that bill of lading and see if those blanks were filled in your office? (Hands paper to witness.)

A. As far as I can say they were.

Q. And the freight was also put in your office, I believe you said?

A. No, sir. Yes, the freight rate but not the amount.

Q. But you didn't put the amount on because you didn't know the weight?

A. We didn't know the weight of the cotton until Farnsworth-Evans Company gave it to us—they sent the weight and the amount of prepaid freight.

Q. Then, Mr. McGehee, the rate that you are to pay on that shipment was determined in this case first, I believe you said. It is customary to be determined by you and the carriers before you made out the bill of lading and sent it out of your office?

A. Yes, sir.

Q. Isn't it a fact that before you make out your rate on a bill of lading you get a confirmation of the through rate from the Missouri Pacific Railroad Company's general agent at Little Rock?

[fol. 69] A. A confirmation of the through rate?

Q. Yes, sir.

A. No, sir; we didn't get any confirmation from them. We just make it from our—the shipping clerk or the rate clerk, he gets it out of the tariff and puts it in there.

Q. Now, the rate for the ocean transportation is not on the bill of lading?

A. No, sir, that has nothing to do with the rate at all.

Q. But you have the through rate on the bill of lading?

A. Yes, sir.

Q. You have to get that confirmed from the Missouri Pacific before you put it on your bill of lading, isn't that true?

A. No, sir, we get it from the steamship companies in Memphis—

we get the ocean rate from them, and they confirm that with the Missouri Pacific at any point we may have a shipment.

Q. Those brokers in Memphis——

A. The brokers give us the rate. Then the brokers notify the railroad company to accept the cotton on this rate from Porter-Weaver & Company.

Q. Then it is the broker who confirms the rate with the Missouri Pacific themselves?

A. Yes, sir. We have nothing whatever to do with it.

Q. But you get the inland rate from the tariff?

[fol. 70] A. Yes, from the tariff.

Q. It is your shipping clerk—he is the one that gets that rate?

A. Yes, sir.

Q. Does he have the railroad tariffs in his office?

A. Yes, he has the railroad tariffs.

Q. Is that shipping clerk department of Porter-Weaver Company's business a late development or——

A. We have to have a shipping clerk all the time.

Q. You are not in that department yourself?

A. No, sir; I am manager of it. I don't pay much attention to him. I am business manager of the whole office. I don't pay much attention to rates.

Q. But you have a shipping clerk whose business is to attend to rates?

A. Yes, naturally so—he keeps us informed on the rates and makes out the bills of lading and puts the rates on the bill of lading.

Q. Do you know what Farnsworth-Evans Company's type Warren is?

A. No, sir. All I know about it is we bought it—we bought Warren type to be shipped against our Pekin. I don't know what they called it—It is very evidence we called it inch and sixteenth—and their Warren type is for our Pekin type because we shipped their Warren cotton for our Pekin.

[fol. 71] Q. Are you sure, Mr. McGehee, that your Pekin is an inch and a sixteenth, or isn't it an inch?

A. No, sir, it is an inch and a sixteenth.

Q. Would it be possible that another might check your Pekin to an inch and an eighth?

A. Yes, some might check it an inch and an eighth. It is hard to get two men to decide on the staple of cotton.

Q. So it could be true very easily that Farnsworth-Evans type Warren was considered by them as one inch staple yet your house would consider it one and one sixteenth staple?

A. Yes, it could be possible.

Q. You stated that the freight on this shipment, which was prepaid, had been returned and repaid to you?

A. Yes, it has been returned.

Redirect examination.

By Mr. Marshall:

Q. You took this Warren cotton from Farnsworth-Evans Company as the equivalent as your Pekin?

A. Yes, sir.

Q. You say that Pekin is one and one-sixteenth?

A. Yes, sir.

Q. Now, you say that cotton men will differ as to the staple?

A. Yes, sir.

[fol. 72] Q. I want to ask you whether your Pekin is one and one-sixteenth in reality?

A. That is what we call it.

Q. That is a good cotton man would class it as one inch and a sixteenth?

A. Yes.

Q. Why is there any difference in that way—because of the staple.

A. Some people know more about pulling staple than others—better judges of staple. When you get into staple cotton it takes as much experience as it does you lawyers.

Q. You have had experts to test that Pekin cotton?

A. Yes, sir.

Q. And it goes through at one and one-sixteenth?

A. Yes, sir.

Q. And you wouldn't have accepted this Warren for the equivalent if it hadn't been so?

A. No, sir.

Q. Now at the time you shipped this cotton, I suppose you drew a draft against them for the amount as shown by that invoice there?

A. Yes, sir.

Q. Now, you said you bought the cotton and sold it at the same time or practically the same transaction—that was back in June?

A. Yes, sir, June 17th.

[fol. 73] Q. There was a decline in the cotton market after that?

A. Yes, sir.

Q. You were asked if you couldn't have substituted the cotton at the time without losing money. You may state why it was not done, or make any explanation of that that you wish?

A. Well, the cotton had been sold on specific contract.

Q. This particular cotton?

A. This particular cotton to be delivered in a specific month in Liverpool, failing to do which we would have had to have accepted the price of cotton at that time in Liverpool, and I didn't know that we might have been able to have bought and shipped it, and got it there in time. That's a matter you couldn't tell, and this cotton was bought and shipped and we had the bill of lading for it.

Q. You already had a contract on this cotton?

A. We already had a contract on the cotton and we had already drawn for the cotton.

Q. Then it was not practical for you to buy other cotton and substitute it under that contract at all?

A. No, sir.

[fol. 74] Recross-examination.

By Mr. Wiley:

Q. Mr. McGehee, you could have delivered other cotton to the purchaser if it was of the same grade in fulfillment of that contract, could you not?

A. If we hadn't already drawn for it—our papers were gone and our exchange given. It was in the hands of the banks—out of our hands entirely. We were notified—we heard the place had burned but we didn't know our cotton was in there until we were officially notified by the railroad company.

Q. That was only five or six days?

A. We traded for the cotton immediately—we didn't hold the cotton—just as soon as we got the bill of lading we drew for it.

Q. You had to make your drafts good?

A. No, sir; we didn't make them good.

Q. Then you didn't lose anything then? Were the drafts that you drew on this cotton itself paid to you?

A. They were paid in Liverpool.

Q. And you never did lose anything then?

A. We haven't lost anything yet, but our insurance, of course, protects us against that fire so long as the railroad company—at least it don't relieve us from any insurance—it protects us against the failure of the railroad to pay the insurance—our policy so stipulates. [fol. 75] You don't release the railroad or anybody else when you have insurance on this cotton?

Q. You mean by that that you had insurance on the cotton?

A. Yes, we didn't have insurance on it until the bill of lading was issued—we did after the bill of lading was issued. It was covered under our policy but not relieving the railroad company of any responsibility for fire.

Q. But regardless of all that you could have, as you said awhile ago, bought other cotton to take the place of this at a much less price?

A. Yes, it could have been bought at a much less price than the contract of sale.

Q. Then, as a matter of fact, couldn't you have delivered them the cotton in fulfillment of that contract at Liverpool, provided you could have gotten it there in time?

A. And get our papers cancelled and brought back—we could probably have bought other cotton in place of it.

Redirect examination.

By Mr. Marshall:

Q. It wasn't practical for you to get everything cancelled and to ship other cotton there to fulfill that contract, was it, in the time you had?

A. No, sir; at this time there was quite a delay in getting ship- [fol. 76] ments through. We had specific contracts and it provided

for shipments in certain months and we have to ship that cotton to fulfill that contract in a certain month.

Q. And you couldn't have made it?

A. I don't remember what date that contract—what date it expired, but we couldn't have gotten a bill of lading and shipped other cotton during the month of October. The railroad company required that the cotton be loaded on cars and it takes twenty-six days to get cotton loaded out of the compress.

Q. About that insurance—you say you haven't got any insurance except in case the railroad company doesn't pay?

A. No, sir.

Q. So in that way—up to this time you have suffered no loss?

A. No, sir; I can't say we have suffered loss. Our insurance company guarantees to us the solvency of the railroad company.

Q. You are compelled——

A. We are compelled to collect this insurance if possible.

Q. Or you will suffer a loss?

A. Yes, sir.

Q. Your insurance doesn't protect you though except in case the railroad company doesn't pay it—that's the case, isn't it?

[fol. 77] A. Yes, it protects us.

Q. Then what is the relationship of that insurance—I want to get it straight?

A. I can show you here the policy. (Hands to attorney.)

Q You may state the effect of it without going into a long discussion of it?

A. I would put it in evidence here and leave a copy of the policy which shows our agreement with the company.

Q. Well, what is the agreement?

A With reference to that I would like for you or somebody else to read that. I can't see very good.

Mr. Marshall: I will read that clause. (Reading.)

This clause is immaterial and insertion of it is waived, by agreement of counsel.

Q. That's the clause governing that, is it?

A. Yes, sir.

Q. Your shipping clerk filled out the bill of lading and you obtained that from the Missouri Pacific?

A. The blank bill of lading?

Q Yes.

A. Yes, sir.

Q. Who furnished them to you?

A. Well, the Missouri Pacific Railroad Company in Memphis.

[fol. 78] Q. Is there any other bills of lading furnished you for your cotton shipments?

A. None that I know of—that's the standard form.

Q. Do you know of any other bill of lading that you could have used?

A. No, sir.

Q. Have you ever been advised that there was an optional form?
A. No, sir.
Q Then your shipping clerk filled out the bill of *out the bill of* lading under the impression that that was the only bill of lading that you could use?

Mr. Wiley: I object to that:
Court: He has already gone into that on direct examination.

Recross-examination.

By Mr. Wiley:

Q. You said, I believe, that you never asked for any other bill of lading?
A. No, sir.
Q. You don't know, Mr. McGehee, what information your shipping clerk had about those matters, do you?
A. No, sir; I don't.

Redirect examination.

By Mr. Marshall:

Q. You were in charge of the shipping department, were you not? [fol. 79] A. Yes, sir.
Q. If there had been any information of that kind, you would have information of it, wouldn't you?
A. Not necessarily.
Q. If you were in charge of the department why you would?

Mr. Wiley: I object to him arguing with his witness.
Court: He said that he would not necessarily have that information. The objection is sustained.

Q. I will ask you if you are referring to matters pertaining to bills of lading, and so forth, when you said you wouldn't know everything that he knew?
A. Yes, bills of lading and freight rates.
Q. He would have information about that that you wouldn't have at all?
A. It would not be necessary for me to know.
Q. You just left that with him?
A. Yes, I just left that to him.
Q Then you wouldn't have charge of that department, would you?
A. Yes, I would have charge of the whole office—have charge of everything that goes on in there. I am blamed for everything that goes wrong, and it is not necessary in any office to know every little detail that men under you have to know.

[fol. 80] Recross-examination.

By Mr. Wiley:

Q. I wish you would look at this to refresh your memory and state whether or not there was any time limit within which you had to ship or whether you could ship in October or November on the goods named. You said it was not possible to ship it in October? (Hands paper to witness.)

A. No, sir; this doesn't give me any information whatever, except it is on a contract for 150 bales. It doesn't stipulate on here at all—I can't see where it stipulates on here any set rate of shipments from the interior, but this, if I may explain, I think is a part of a contrart probably for the whole 1,000 bales—this was transmitted by A. L. Devant to Earle, Arkansas, on a part of a contract for the whole 1,000 bales—which I think it was. I can't tell the month of specific shipment from the interior. I don't know and this doesn't state. That's not the original contract—it is just an order to the office at Earle to ship that much cotton.

Q. Was there or not any time limit then which you had the right to ship this cotton?

A. Always. I don't know what the time limit was but any contract with them they give you certain months of shipment—that you have to ship from the interior in certain months to be able to obtain the rate.

Witness excused.

[fol. 81] W. E. Martin, a witness in behalf of the plaintiff, being recalled for further examination, testified as follows:

Redirect examination.

By Mr. Marshall:

Q. The regulation which was read this morning required you to use for this export shipment No. 1168½-M or 1168. This bill of lading which you used is shown to have been 1168 without the M. Now, what was the difference in those bills of lading, if any. Why was it you used this instead of "M," or does the "M" make any difference?

A. I could not say.

Q. You were required to use 1168-M why did you use 1168½?

A. I told you I couldn't say why I used it, but I did use it.

Q. Do you know what the difference is in this bill of lading with the "M" and without the "M?"

A. No, sir; I don't because I haven't read them.

Q. This was the bill of lading that was furnished you to be used?

A. Yes, sir.

Q. It was the only one you had there?

A. It was the only one that was furnished?

Q. It was the only one you had there that you could give at that time?

[fol. 82] A. No, I wouldn't say that—we might have had some other blanks.

Q. Why do you say that was the only one that was furnished?

A. That was made out and sent there by them.

Q. As agent there it was your business to see that the proper bill of lading was issued?

A. I considered that the proper bill of lading and so did they, I guess.

Q. You didn't look at the rule that required 1168½-M?

A. I don't know whether I did or not.

Mr. Marshall: Your Honor, I have got hold of a bill of lading that is really 1168-M and I would like to introduce it. Of course these bills are always printed and we can show afterwards whether there is any difference or not.

Mr. Wiley: I have no objection.

(The above paper was here introduced in evidence, read to the Court, marked as Exhibit "E" and is as follows:)

[fol. 83] EXHIBIT "E" TO TESTIMONY OF W. E. MARTIN

Form 1168-M. G. F. O. Authority No. G7358

[Missouri Pacific]

St. Louis, Iron Mountain & Southern Railway

B. F. Bush. Receiver

In Connection with Other Carriers on the Route

Export Bill of Lading No. F. C. Lot No. —. Contract number: F. E. C. R. R. 2654.

Dated at Benton, Ark., this Seventeenth day of March, 1920.

Received at Benton, Ark., date 3/17/20; from Owasso Mfg. Co., the following property in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, numbered, consigned and destined as indicated below.

Consignee and Destination: Alvarino of Alfonso Sen C.

Party to be notified: L. E. Arwood, Key West, Florida.

Inland Routing: M. & P., Nys., Sou., Jacksonville, Fla., Fla. East Coast, Key West.

East Coast Ferry to Havana, Cuba

Marks and numbers	Articles
charges prepaid on rate of 77½ per cwt.	625 Budls. Folding Veg. crates, K D. in Bdls. flat, 10 crates to each budle., total 6250 crates.
Car number	625 [illegible]lls. covers for said Veg. crates in Bundles flat, 20 covers to each Budle. Total 12500 covers.
C. B. & Q 118258	
Frt. 310.59 {Pd. 3/24/20 {A O 3-240	3 Bundles crate Material to be used as repairs for Vegetable crates.
	*Shippers. Weight 40078 Pounds. (Subject to Correction.)
	(*U. S. Law requires Agents issuing Bill of Lading to write either "shipper's" or "carrier's" before "weight.")

To be carried to the Port (A) of Key West, Fla. and thence by Ferry to the Port (B) Havana, Cuba (or so near there as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition, as above consigned, or to consignee's assigns, or to another carrier on the route to destination if consigned beyond said port (B), upon payment immediately on discharge of the property, of the freight thereon, at the rate from Benton, Ark. to Key West, Fla. of 37½¢ cwt. cents and (ocean) from Key West, Fla. to Havana, Cuba, of 40½¢ cwt. United States gold currency, per one hundred pounds Gross Weight, and advanced charges —— ($——), with all other charges and average, without any allowance of credit or discount; settlement to be made in cash, the freight and charges expressed in U. S. Currency to be first reduced at $4.80 per Pound Sterling and the Sterling amount to be paid by receivers at current rates of exchange for which Bankers' Demand Bills on London can be bought as officially quoted on the day the ship is entered at the Custom House at her port of discharge.

If dimensions of bale or bales of cotton or cotton linters does not exceed 27 by 54 inches and providing each bale is compressed to density of 22.5 pounds per cubic foot; any bale exceeding dimensions prescribed that does not show required density shall pay an extra ocean freight of 50 cents per bale unless repressed to required density before delivery to the ocean carrier. Bales of larger measurement than 27 by 54 inches shall pay an extra ocean freight of $-.00 per bale in addition to the rate per hundred pounds herein specified for bales of standard size 27 by 54 inches

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper, and by him accepted for himself and his assigns, as just and reasonable.

Conditions

Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be void.

I.—With respect to the service until delivery at the port (A) first above mentioned, it is agreed, that:—

1. No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire; or by quarantine; or by riots, strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable, shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events, such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the Agent at point of delivery promptly after arrival of the property, and if delayed for more than one hundred and twenty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route Cotton is to be carried hereunder, shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it, within twenty-four hours after its arrival at destination (Port A), may be kept in the car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, and there held subject to lien for all freight and other charges. Property taken from a station at which there is no regularly appointed agent, shall be entirely at

risk of owner until loaded into cars; and when received from private or other sidings, shall be at owner's risk until the cars are attached to trains.

6. No carrier hereunder will carry, or be liable in any way for any documents, specie or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are endorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

8. If, upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

9. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the further conditions, that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described, shall have liberty to call at intermediate ports to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property.

10. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession, is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

11. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamer, her master, agent, or servants or to the steamship company, or on the steamer pier at the said port and the inland freight charges shall be a first lien due and payable by the steamship company.

[On margin:] Attention of shippers is called to the Act of Congress of 1851, which provides, that any person or persons shipping Oil of Vitriol, Unslacked Lime, Inflammable Matches, or Gunpowder in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master,

mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.

II.—With respect to the service after delivery at the port (A) first above mentioned, and until delivery at the port (B) second above mentioned, It is agreed, that:—

1. The steamer shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in craft and or lighters, to and from the steamer at the risk of the owners of the goods; and, in case the steamer shall put into a port of refuge, or be prevented, from any cause, from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamer; that the carrier shall not be liable for loss or damage occasioned by fire, from any cause, or wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; by arrest or restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, provided, the owners have exercised due diligence to make the steamer seaworthy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value.

General average payable according to York-Antwerp Rules. If the owner of the steamer shall have exercised due diligence to make said steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed, that in case of danger, damage or disaster, resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the steamer, or from latent or other defects, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contributions in General Average, or for any special charges incurred, but, with shipowner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

2. That this shipment until delivery at the port (B) second above mentioned, is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act Relating to the Navigation of Vessels, Etc."

3. That the value of each package receipted for as above, does not exceed the sum of one hundred dollars, unless otherwise stated herein, on which basis, the rate of freight is adjusted.

4. That the carrier shall not be liable for articles specified in Section 4281 of the Revised Statutes of the United States, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading.

5. That shippers shall be liable for any loss or damage to steamer or cargo, caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed, at any time, without compensation.

6. That the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents.

7. That in case the steamer shall be prevented from reaching her destination by quarantine the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods, shall be a lien thereon.

8. That the steamer may commence discharging immediately upon arrival, and discharge continuously, any custom of the port to the contrary notwithstanding the Collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the steamer by the consignee directly they come to hand in discharging the steamer, the master or steamer's agent to be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the goods shall be deemed delivered, and steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until the payment of all costs and charges so incurred.

9. That if, on a sale of the goods at destination, for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

10. That full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

11. That in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination, on the day of the steamer's entry at the Custom house, less all charges saved, steamer being only responsible for such part of the goods as have been actually delivered to the steamer at the port (A) first above mentioned, and steamer not liable for

any loss or damage that may have occurred before such delivery, while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port (A) first above mentioned.

12. That merchandise on wharf awaiting shipment or delivery, be at shipper's risk of loss or damage, not happening through the fault or negligence of the owner, master, agent, or manager of the steamer, any custom of the port to the contrary notwithstanding.

13. That this bill of lading, duly endorsed, be given up to the steamer's consignee in exchange for delivery order.

14. That freight prepaid will not be returned, goods lost or not lost.

15. That parcels for different consignees collected or made up in single packages addressed to one consignee, pay full freight on each parcel.

16. That freight payable on weight, is to be paid on gross weight landed from ocean steamer, unless otherwise agreed to, or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight, but inland freight and charges paid on wheat, peas, maize or other grain or seed, or other bulk articles from point of shipment to seaboard, shall be paid by consignee at destination on the weight delivered on board ocean steamer.

17. It is stipulated, that, in case the whole or any part of the article specified herein be prevented by any cause from going in the first steamer leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeeding steamers employed in the steamship line, or if deemed necessary by said carrier, it may forward them in other steamers.

18. That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the Steamship Company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

19. That if the goods are destined beyond the port (B) second above mentioned, the transhipment to connecting carrier shall be at the risk of the owner of the goods, but at steamer's expense, and that all liability of the Steamship Company hereunder terminates on due delivery to connecting carrier.

III.—With respect to the service after delivery at the port (B) second above mentioned, and until delivery at ultimate destination, if destined beyond that port, it is agreed that:—

1. In case the regular steamship service to final port of delivery, for any reason be suspended or interrupted, the carrier, at the option

of the owner or consignee of the goods, or the holder of the bill of lading, may forward the goods to the nearest available port, this to be considered a final delivery; or to store them at the port (B) second above mentiond, at the risk and expense of the goods, until regular service to final port of destination is opened again.

2. That the property shall be subject exclusively to all the conditions of the carrier or carriers completing the transit; the duty of notification above provided for shall fall exclusively within the obligation of the carrier completing the transit, and no prior carrier shall be responsible for the fulfillment of that obligation.

And Finally, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading, agree to be bound by all of its obligations, exceptions and conditions whether written or printed, as attested by the signature of shipper or representative signing in behalf of shipper.

In Witness Whereof, the Agent signing on behalf of said B. F. Bush, Receiver St. Louis Iron Mountain & Southern Railway, and of the said Ocean Steamship Company or Ocean Steamer and her owner, severally and not jointly, hath affirmed to — Bills of Lading, all of this tenor and date, one of which bills being accomplished the others to stand void.

G. B. Newhill, Agent.
On behalf of carriers, severally and not jointly.
Owasso Mfg. Co.
Shipper.

[fol. 84] Mr. Marshall: I would like if we get hold of 1168½-M—I would like to see that.

Mr. Wiley: The witness has testified that they are just copies of each other.

Q. Are they just copies of each other?

A. Yes, as far I know—to my best knowledge it is.

Thereupon it was agreed by and between counsel for plaintiff and defendant that bills of lading Nos. 1168½ and 1168½-M are used for cotton export and that 1168 and 1168-M are used for other export commodities.

Witness excused.

[fol. 85] Clay Sides, a witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. What is your name?

A. Clay Sides.

Q. What business are you in?

A. I am in the traffic—freight traffic business.

Q. You are running an office in Memphis?

A. Yes, sir.

Q. How long have you been in that business?

A. I have been in the traffic game for approximately twenty years.

Q. Did you ever act as agent for the railroad company?

A. No, sir.

Q. You have been in the traffic business—I suppose you are familiar with all questions in regard to bills of lading and rates, and so forth?

A. Practically all, yes, sir.

Q. The question has arisen here about a rule that is called Rule 1, as found in the Consolidated Freight Classification No. 1, and a rule that is found in Freight Tariff—Missouri Pacific No. 215-H. It has already been identified and parts of it introduced. Now, I would like for you to look at the exception contained in the face of that and then look at the rule I called your attention to and say [fol. 86] whether the cotton exports were taken out from under that rule No. 1—I would like for you to read that so the stenographer can get it?

A. (Reading:) "Governed, except as otherwise provided herein, by the Consolidated Freight Classification No. 1, Western Classification No. 56, Agent R. C. Fyfe's I. C. C. No. 14, P. S. C. Mo. W. C. No. 5 (Mo. Pac. No. 20M, supplements thereto or reissues thereof, and exceptions to said Classification, Mo. Pac. Rules and Regulations Circular No. 114-G, I. C. C. No. A-4662, P. S. C. Mo. No. 1072, supplements thereto or reissues thereof."

Q. Now, turn to page No. 39 which was referred to by another witness and read, under the head of bills of lading. Read the small letters "c" and "d", and see whether that takes these cotton shipments out from under the rules referred to?

A. You don't want me to read these into the record?

Q. No, they have been read once.

A. The tariff says "Governed by Classification except as otherwise provided herein." Under Item 130 there are exceptions to the classification rules.

Q. Is that Item 130 referred to on Page 39?

A. Yes. That contains exceptions to the classification Rules, hence those exceptions govern.

Q. Have you been engaged in shipping cotton or had anything to do with shipping of cotton yourself?

[fol. 87] A. No, sir.

Q. Not directly?

A. No, sir; I have not.

Q. Are you familiar with the rates and bills of lading that are used?

A. To a general extent, yes, sir.

Q. Can you refer to page 162 of the cotton schedule and see what the rate was from Earle to Brunswick, Georgia?

A. Under the heading "South Atlantic Points" 74 cents plus on August 26th, 1920, an increase of 33⅓ per cent.

Q. Add that to the 74 and see if it makes 98½ the rate it was shipped on under the bill of lading?

Mr. Wiley: There is no dispute about that.

Q. That's the only published rate between those two points?

A. That I know of.

Q. That's the only rate sheet, is it not?

A. That's the only one I ever heard of from Earle to South Atlantic ports.

Q. You are familiar with the shipments, are you not?

A. Yes, sir.

Q. I will ask you if the same rate is also used for interstate shipments between the two points?

A. Yes, sir.

[fol. 88] Q. Sometimes referred to as domestic shipments?

A. Yes, sir.

Q. There is no rate for every kind of shipment?

A. No, sir.

Q. I mean no other——

A. I am talking about specified published rates now.

Cross-examination.

By Mr. Wiley:

Q. You didn't help make this bill of lading that you have just testified about?

A. No, sir.

Q. What kind of traffic game are you in?

A. I have put in approximately seventeen years in the general freight office of the Rock Island. Now, I am in an independent traffic service, that is, working for shippers—not with the railroad company.

Q. What is it that you mean is an exception in your answer to question on direct examination. Just refer to the tariff and tell the court where is the exception?

A. Well, under the heading that is in this item in the Consolidated classification——

Q. What is the exception that you refer to—that is what I want?

A. This thing says that "Foreign bills of lading are to be used for [fol. 89] Cotton and Cotton Linters consigned to other destinations than on the American Continent; that is, England, Germany, France, etc. The present form of Foreign Bill of Lading is 1168-? and 1168½-M." Now, I don't know of any rule in the Consolidated Classification covering the issuance of a bill of lading on export traffic—that is called an exception.

Q. What is that you say is an exception to the consolidated Freight Classification on No. 1?

A. That is part of it.

Q. How is that an exception?

A. That is an addition to exception because there is no such rule in the classification.

Q. Well, is that all?

A. It goes on to say that "all bills of lading must be free from alterations or erasures" and so forth.

Q. Go on?

A. "Except as provided for in Item No. 115, and must contain a correct description of the Cotton or Cotton Linters covered, including marks, quantity, conditions, etc." That is an exception to the classification.

Q. How?

A. In one way under a bill of lading in the classification you have got to change it under Rule 1, and this says you can't change a bill of lading.

[fol. 90] Q. That is what you think is an exception, is it?

A. Yes, sir.

Q. Don't you know, Mr. Sides, that that wasn't aimed at that at all, but was aimed at the prevention of frauds and changes in the description, weights and items of the property shipped?

A. That may be true as to the aim, but we have to take what is in the tariff—we can't go upon the aim.

Q. You know what the aim of that provision was?

A. No, sir.

Q. When did you first construe that tariff that way?

A. Well, as far as the Missouri Pacific—as far as that particular tariff is concerned—I have seen the tariff off and on for several years, but so far as handling export bills of lading and construing it, I can't say that I have seen it so long ago.

Q. Did you ever before today construe it that way?

A. No, sir; because I was never asked the question before today.

Q. This question is of first impression to you today, isn't it?

A. The first time I have been asked to construe the item.

Q. You have given it no special study with reference to the freight tariff and the consolidated freight classification No. 1?

A. If you would call several days thinking it over—I would say [fol. 91] No, I have not.

Q. You know, don't you, that this same provision which you have just read is provided for all other export commodities in their tariffs besides the cotton tariffs?

A. I couldn't answer that off hand without looking at another export tariff.

Q. You don't know whether that is true or not?

A. I can't say whether it was true or not.

Q. Now, it doesn't say in that provision which you have read there additions are prohibited by stamping or writing on the face of the bill of lading duly authenticated by the signature of the agent, does it?

A. It doesn't say the exact words that you mentioned there, but it says no alterations or erasures can be made.

Q. Do you understand, Mr. Sides, I am asking you as a traffic expert, if that would prohibit the authenticated addition of a stamp on the face of the bill of lading duly authenticated by the signature of the agent?

A. The agent has no authority to change any provision in the bill of lading by stamping—any stamp he might put on it.

Q. Suppose the Consolidated Freight Classification No. 1 gives him authority to stamp the face of the bill of lading with a certain [fol. 92] endorsement and authenticate them with his signature. Do you say that this provision that you have just read would prohibit that under the name "alterations?"

A. I say that is an exception to the classification after the classification can't—he can't change this after it is in the bill of lading.

Q. Is that the best answer you can give to that question?

A. Yes, sir.

Q. You don't say that that would prohibit the stamping of an endorsement on the face of the bill of lading at the time it is issued, duly signed by the agent at the time it is issued, if such a stamp was provided for in the Consolidated Freight Classification No. 1. I say you won't say this would prohibit it then?

A. I will say this nullifies any provision regarding the bill of lading that might be in the classification.

Q. It is your view that Item 130, page 39, which you have just read, would nullify any provision in the bill of lading in the Consolidated Freight Classification No. 1?

A. It would nullify any provision regarding any alteration or change in the bill of lading.

Q. You won't say it would prevent the stamping or an endorsement on the face of the bill of lading duly authenticated by the [fol. 93] agent at the time he issued the bill of lading?

A. I say the agent hasn't authority under anything to do such a thing, that is, to place a stamp on the bill of lading.

Q. Or to sign his name on it?

A. Oh, yes.

Q. Even if the Consolidated Freight Classification provided that he could?

A. It cannot provide it when this nullifies it.

Q. You think this does nullify it?

A. I absolutely do.

Witness excused.

The plaintiff here rested its case.

[fol. 94] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Wiley: I move to exclude the testimony of the witness Sides, with reference to his opinion or construction of the Item 130 at Page 39, of the Freight Tariff on Cotton and Cotton Linters, No.

215-II. All of the testimony of the witness Sides, which attempted to construe or give the meaning of that as being an exception to the Consolidated Freight Classification No. 1, as the witness stated, nullifying any provision in it, on both direct examination and cross examination because there is no showing whatever made, and the plaintiff has rested on his main case, except that he wants to prove the value of the cotton, that the words used in Item 130, Page, 39, have any peculiar or technical meaning. They are words of ordinary meaning and their construction is for the court, and in the absence of proof by the plaintiff that they are words of peculiar os tenhnical meaning, the testimony, as much as Mr. Sides know, would not be competent. I move that it be excluded.

Mr. Marshall: Brother Wiley cross examined this witness on the merits of it, and now he wants to exclude what he himself brought out. I believe there is a rule of evidence where we go into the merits of a piece of testimony like that, that you can't afterwards move to exclude it. Not only that but it is useless to take the time of the Court, who is trying this case without a jury——

Court: I rather think under the decisions of the Supreme Court when a circuit court tries a case as Court and Jury he is bound by the same rules of evidence as if he had a jury.

[fol. 95] Mr. Marshall: I think there is a rule where opposing counsel goes into as he did on cross examination that he can't move to exclude it afterwards. I know that rule has been enforced against me a number of times.

Court: I think myself that Mr. Wiley should have made his objection before the finish of the direct-examination—before he examined him.

Mr. Marshall: This morning the same testimony was resorted to by another witness and Mr. Wiley cross-examined him in the same way and never moved to exclude that evidence at all. Now he opposes it and moves to exclude this evidence but he let the other stand—that don't look consistent to me at all.

Court: I don't think the witness can be allowed to say what is meant by the words alterations or erasures.

Mr. Marshall: Can't be allowed to testify about what is the effect of these provisions read here.

Court: He testified to what he thought was meant by alterations—and I understand he objected to his testimony.

Mr. Marshall: But the objection is not confined to that. He wants to cut out the whole proof—the whole testimony. I didn't ask him anything about alterations—he brought that out.

Court: What was your motion Mr. Wiley?

Mr. Wiley: It was to exclude all his testimony in which he attempted to give his construction of that provision that the bills of [fol. 96] lading must be free from all alterations and erasurers. I objected this morning and I think there was another time when I reserved the right to object, which was in response to an urgent request from Mr. Marshall that we go ahead, and we might dispose of it later.

Court: As far as this witness testifying is concerned I will exclude that part of his testimony which intended to interpret or give his opinion of the meaning of that section which you have referred to.

Mr. Wiley: That's his whole testimony.

Mr. Marshall: I don't think so, but I will save my exceptions.

(To which ruling of the Court the plaintiff at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

[fol. 97] A. W. AYLIN, a witness in behalf of the defendant, being first duly sworn, testified as follows.

Direct examination.

By Mr. Wiley:

Q. Where do you live?

A. Little Rock.

Q. What is your business?

A. Chief Clerk to the General Freight Agent of the Missouri Pacific Railroad Company.

Q. How long have you been so?

A. Since 1911.

Q. What are your duties in that business with reference to shipments over the railroad?

A. A general supervision of the office, over the making and confirming of export cotton contracts and handling them through our local agencies.

Q. In the performance of your duties state whether or not you are familiar with the rates and tariff provisions governing export shipments?

A. Generaly speaking, yes.

Q. Did your office have anything to do with the shipment in question in this case.

A. We did.

Q. What was it—tell the court?

A. We secured from A. R. Devant Steamship Company—a broker in Memphis, confirmation of the ocean contract, and in turn con-
[fol. 98] firmed it to our agent at Earle and authorized him to sign through export bill of lading covering 75 bales of cotton for Porter-Weaver & Company at Liverpool.

Q. What was the rate provided for that shipment over the Missouri Pacific?

A. The rate from Little Rock to Brunswick, Georgia?

Q. From Earle?

A. From Earle to Brunswick, Georgia, which was the point of export at the time, was 98½ cents per hundred pounds, provided in Missouri Pacific Cotton Tariff 215-H, Supplement No. 5.

Q. That is the one that was read from this morning?
A. Yes, sir.
Q. Was that tariff governed by the Consolidated Freight Classification No. 1?
A. It shows on the title page that it was.
Q. Is this book I hand you Consolidated Freight Classification No. 1? (Hands book to witness.)
A. Yes, sir.
Q. That was in effect at that time?
A. Yes, sir.
Q. What provision in it has reference to the unlimited or carriers' liability rate on foreign shipments?
A. Rule 1, which was read this morning?
Q. That is Rule No. 1, at page 1, of this tariff?
A. Yes, sir.

[fol. 99] Mr. Wiley: This being Rule 1, Page 1, of Consolidated Freight Classification No. 1, I want the same stipulation about that as we had this morning.
Mr. Marshall: All right.
Mr. Wiley: It is agreed that this is consolidated Freight Classification No. 1, the Official Classification, Southern Classification, and Western Classification, and applies on freight traffic covered by tariffs issued subject to either the official, Southern or Western Classification as such tariffs may provide, and duly prepared, printed and filed with the Interstate Commerce Commission, and published according to law, and effective at the time of this shipment.

Q. What classification is the territory embracing Earle, Arkansas within?
A. The Western.
Q. I notice this Consolidated Classification No. 1 which I have just referred to says: "Unless otherwise provided therein the following are the Rules of the Official Classification, the Southern Classification and the Western Classification," and "Unless otherwise provided, in this classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of the Uniform Bill of Lading or the carrier's Export Bill of Lading, as the case may be." I might request—have you examined this Consolidated Freight Classification No. 1 for the purpose of seeing whether or not it is otherwise provided in it——
[fol. 100] Mr. Marshall: I object to that because if there is anything of that kind to be shown it cannot be done by a witness who says he just looked through it. If it is there you will have to show it; if it is not there he can't say——

Mr. Wiley: He can go on the stand and testify that he has examined the records and it is not there.
Court: I think if any one wants to prove an exception to the rule it is up to him to prove it. The burden is on the other side to prove that as far as that is concerned—if you want to prove an exception to the general rule——

Mr. Marshall: We think we have done that.

Court: I am assuming that it is not otherwise provided unless the other side shows that it is.

Mr. Wiley: I want to introduce this Page 1, of Consolidated Freight Classification No. 1, Rule 1. It has already been read but I will read it again. I want to introduce it here.

Court: It was read this morning into the record.

Mr. Wiley: Yes it was read, but I want to re-introduce it.

Q. Mr. Aylin, how would the amount of the higher rate provided for in this Rule 1 be arrived at for the purpose of applying the rate so as to give the shipper an unlimited or carrier's liability service?

A. By the addition of ten per cent to the ordinary tariff rate as published in our cotton tariff.

Q. In this instance it would be ten per cent added to 98½ cents?

A. Yes, sir.

[fol. 101] Cross-examination.

By Mr. Marshall:

Q. Now, this Rule No. 1, you are still publishing as applying to all shipments—domestic, foreign and otherwise, are you not?

A. Yes, sir, we do.

Q. Do you undertake to say that the rule No. 1 is in full force and effect in cases of interstate shipments?

A. Yes, sir.

Q. You think that Rule No. 1 is in force and effect on interstate shipments?

A. They are, yes, sir.

Q. Are you not aware that under the statute that you cannot ship except under one rate and one liability unless you have a rate for the release of liability?

A. Not being a lawyer, I don't know. All I know is the rates and rules we have in our tariff, which govern us in the movement of freight traffic.

Q. Your answer is that this rule applies also to domestic shipments?

A. Yes, to domestic shipments.

Mr. Wiley: I object to the question and answer.

Court: I don't think it is material to the question here unless he is doing it for the purpose of attacking his credibility as an expert.

By Mr. Wiley:

[fol. 102] Q. Mr. Aylin, I forgot to ask you this—where in this Cotton Tariff No. 215-H is the rate found, and what is the provision of the tariff that makes the rate? Just explain that, please.

A. Item No. 15, Page 35, of Tariff 215-H, specifies the South Atlantic points to which the rates shown on Pages 138 to 182 applies. Item 15 includes Brunswick, Georgia, page 162, Index No. 2580, and names a rate of 74 cents to the Southern Atlantic coast points, includ-

ing Brunswick, and that's the rate—this rate on April 26, 1920, in Supplement No. 5, was increased 33½ per cent, making the rate at that time 98½ cents, which rate — in effect when the shipment moved.

Recross-examination.

By Mr. Marshall:

Q. Now, I want to ask you if this rule that you have referred to in the Consolidated Freight Classification is not a general rule applying to generally——

A. It applies to all railroads—to all tariffs subject to the classification, yes, sir.

Q. Isn't it a fact that if there are any specific provisions in the rate sheets or tariffs or in the rules, containing the rate sheets or tariffs—if they are in conflict with the general provisions that the specific provision would control?

[fol. 103] A. Yes, they would.

Q. You haven't undertaken to say from this cotton tariff here, I believe, that the shipment of cotton for export hadn't been taken out from under that rule by the provision which has been read here?

A. According to my interpretation of the tariff they have not been taken out, no, sir.

Q. But you would say if there is a specific provision in the rules which is in conflict with the general rule it would control?

A. The rules in the individual tariff would take precedence over the classification.

Q. Then if the language used in the cotton tariff is such as to show it was an exception to the general rule, it would take it out from under it?

A. Yes, sir.

Q. Isn't there a rule too that you go by that if there is a conflict in the rules that the shipper is given the benefit of the most favorable construction?

A. Where two rates are published in the same tariff.

Mr. Wiley: I object to that.

Court: The rule itself would be the best evidence.

Redirect examination.

By Mr. Wiley:

Q. I wish you would state to the Court what it is—this Con-[fol. 104] solidated Freight Classification No. 1. Tell him what it is, and the object and purpose of it?

A. The Consolidated Classification is the classification now applying to three major classification territories of the country, the Western, Official and Southern. Formerly the three classification territories each had a separate issue covering the rules and regulations as well as the classification of the various commodities moving in

each territory. The purpose of this classification is to simplify the regulation of rates by the traffic managers and shipping public—it enables them to find the classification in one issue instead of going to three.

Q. What is the classification, I mean?

A. The classification of the volume of rules covering the transportation of freight traffic as well as what its name implies—the grading of the various commodities and placing them in their proper class for transportation.

Q. State whether or not is is a necessary adjunct to a tariff?

A. Yes, sir, it is.

Q. If anything, what relation does it have to a tariff?

A. It provides the rules covering the handling of all commodities in the tariff—and are made subject to the classification.

Q. Are freight tariffs made subject to some classifications that [fol. 105] are published and filed and in what way?

A. As a general rule I would say yes—some are not however.

Q. I will ask you, Mr. Aylin, whether or not it is the custom for carriers to have stamps of various kinds to make endorsements on the face of bills of lading?

Mr. Marshall: I object to that unless he can testify that this particular office was furnished with a stamp to put on the bill of lading such as the rule seems to contemplate—unless he knows the rule is there.

Witness: You mean that particular clause?

Mr. Marshall: That particular clause.

Q. Whether it is the common practice——

Mr. Marshall: It is absolutely, under the rules of evidence, incompetent. He is trying to prove by custom a particular fact. Of course, he can't do it.

Court: You invited that kind of question by your witness testifying that he never heard of any change being made in a bill of lading.

Mr. Marshall: I think that's a different matter. It is under the rules of evidence incompetent.

Court: You had one witness to testify generally that he never heard of such a stamp.

Mr. Marshall: Yes, but that wouldn't invite such testimony that it was the custom to have these stamps. How far would you get with that kind of evidence in determining whether or not there was a stamp of that kind at Earle, Arkansas.

Court: The question as framed doesn't mean anything.

[fol. 106] Q. I will ask you whether or not it was the custom and common practice of carriers by means of stamps to make endorsements of various kinds with reference to the shipments, rates and terms thereof, upon bills of lading?

A. Do you mean aside from the printed bill of lading contract?

Q. Yes.

A. Yes, sir it is.

Mr. Marshall: I object to that.
Court: The objection is overruled.

(To which ruling of the court the plaintiff at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

Witness: In explanation of my answer, Mr. Wiley, our office handles all the export bills of lading for our line at Little Rock. We have always had certain stamps which are supposed to have been shown in the face of the bill of lading which are outside of the printed matter thereon.

Q. You answered a few minutes ago a question of opposing counsel that the provision which he had read—Item 130, Page 39, of Cotton Tariff 215-H, didn't constitute an exception to the Consolidated Freight Classification No. 1. I would like to ask why it does not.

Court: That is really the same thing I ruled on before.
Mr. Wiley: He brought it out, Your Honor.
Court: On cross examination and you didn't object to it. The objection is sustained.

(To which ruling of the Court the defendant at the time duly [fol. 107] excepted and asked that its exceptions be noted of record, which was accordingly done.)

Court: You can let him state it if for the record, but it will be excluded.

Q. State what you mean by your answer to Mr. Marshall why you didn't think it was?
A. Because there is nothing in the item which prohibits an addition to the face of the bill of lading.

Mr. Marshall. That is exactly what was excluded.
Witness: You asked me why.
Court: It is excluded now but he is showing what the witness would have testified to.

Witness excused.

The defendant here rested its case.

[fol. 108] STIPULATION RE ADDITIONAL EVIDENCE

Thereupon by agreement of counsel plaintiff was allowed to introduce additional evidence on the value of the cotton, and thereupon on June 15, 1923, the following evidence was taken before the court:

W. T. BLACK, a witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. What is your name?
A. W. T. Black.
Q. What business are you in?
A. Cotton business.
Q. How long have you been in that business?
A. About twenty-five years.
Q. Just how are you in the cotton business?
A. Well, for the past six or seven years I have been connected with buying firms—buying and shipping cotton from this territory—from Little Rock and adjacent territory.
Q. Are you familiar with the price and the different grades and staples of cotton in this market and territory extending over to Memphis?
A. I think I keep pretty well posted on values from day to day.
[fol. 109] Q. On October 21, 1920, what was the Little Rock market on fully middling to good middling cotton, Warren staple, which is one and one-sixteenth staple?
A. The best of my recollection is the prevailing price at that time on that grade and staple was about 250 on the heads month which at that time was the December option in New York.
Q. Explain that in plain terms?
A. That would make it come to 22½ cents.
Q. That is considering the grade I have stated and the staple?
A. Yes, sir.
Q. You are speaking of the Little Rock market?
A. The Little Rock market.
Q. State whether or not the Memphis market would be the same?
A. That would be somewhat higher—probably 50 points higher.
Q. That would be the value of the cotton translated into cents per pound if it was 50 points higher?
A. 22¾ or 23 cents Memphis.

Cross-examination.

By Mr. Wiley:

Q. What would be the Earle market?
A. The Earle market would be practically the same as the Memphis market—it is in close proximity.
[fol. 110] Q. There would have to be the freight added?
A. Yes, probably 20—15 or 20 points difference, a little higher at Earle than Memphis.
Q. Why wouldn't it be lower than higher—you have got to pay the freight on it to Memphis?

A. Yes, the freight rates don't always apply. Of course, Earle is in the Memphis territory.

Q. What was the market on upland——

A. My recollection is about 20¼ cents.

Q. What was it at Memphis?

A. About 20½ cents.

Q. Then it is your idea there is more than two cents difference between mid-ling upland and good mid-ling, one and one-sixteenth staple?

A. Yes, very easily that.

Redirect examination.

By Mr. Marshall:

Q Earle really is hardly a cotton market—it is governed by Memphis?

A. Practically all of the cotton handled there is handled by Memphis.

Q. And the cotton handled there is a few points higher than at Memphis?

A. Yes, the freight rates are higher but the prices are about the same.

Q What figure would the freight rate cut with the market at Earle?

[fol. 111] A. From a statistical standpoint it would make the cotton about 15 points less than at Memphis, but the price paid—You will find quite frequently that the price paid in Earle would be the same—in Memphis as it would in Earle.

Q. In other words you practically disregarded the freight rate?

A. Yes, sir.

Q. How much would that 15 or 20 points make if you figure it in cents?

A. Figuring 22 cents for the cotton in Memphis it would make it figure about 22.85 in Earle.

Q. That is if the freight was figured in the price?

A. Yes, the difference in the freight.

Witness excused.

[fol. 112] O. O. Scroggins, a witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. Your name is O. O. Scroggins?

A. Yes, sir.

Q. What is your business?

A. Cotton business.

Q. How long have you been in that business?
A. About fifteen years.
Q. In Little Rock?
A. Twelve years in Little Rock,—about sixteen years to be exact. I was at Morrilton before that.
Q. Now, on October 21, 1920, just state what was the market on fully mid-ling to good middling staple 1 1/16?
A. What grade is that?
Q. The grade is fully middling to good middling.
A. Fully mid-ling to good mid-ling?
Q. Yes.
A. And inch and a sixteenth?
Q. Yes.
A Well, I would think around 23½ or 24 cents would be the value of the cotton in Little Rock on that date.
Q Well, you were in the business actively at that time?
[fol. 113] A. Yes, sir.
Q. And you remember the market. Now, what was it——
A. I would say that possibly 23½ and 24 cents—that kind of cotton for it would bring a very high premium, and that might be a little low. I remember back in September I sold some cotton in mid-ling grade for 900 points or nine cents a pound premium——
Q. That would make it what?
A That would make it—make the cotton around 28 or 29 cents. I guess the basis at that time would be around four or five hundred on here—possibly 400. I think that would be correct.
Q. That would make what price?
A. That would make the cotton around 24—about 23½ or 24 cents. I don't remember just what the future market was.
Q. Are you figuring on the staple Warren which Porter-Weaver & Company of Memphis uses?
A. No, sir, I am not.
Q. What would you say about a comparison of the markets of Little Rock and Memphis?
A. Well, I would say they would—Memphis would be a bit higher, but not much.
Q. About how much?
A. Oh, I would guess a quarter or three-eights of a cent would cover it. They would get a little bit cheaper freight rate to the ports, you know.
Q. The difference is——
[fol. 114] A. The difference is in the freight rate.
Q. That is, you think, about a quarter to a half cent?
A. I guess about a quarter to three-quarters.
Q. What would you say about the Earle market, if there is an Earle market?
A. I never bought any cotton around Earle. I am not prepared to say.
Q. Considering its proximity to Memphis and its distance from Little Rock——

A. My experience is the Earle market would be practically the same as the Memphis market. I am speaking only from general knowledge—personally I never bought any cotton there.

Cross-examination.

By Mr. Wiley:

Q. Why the difference between you and Mr. Black on price?

A. I couldn't tell you about that.

Q. He is in the cotton business here and you are?

A. I am not able to say. I am speaking on my own observation and business experience.

Q. Did you ever look up the market quotations for the purpose of testifying?

A. I looked up the spot quotations. I didn't look up the future. I know about what I was paying for cotton. I know the basis on inch and *and* a sixteenth was awfully high. I sold some from 900 [fol. 115] to nine and a half on.

Q. That was way back yonder?

A. It was in September but the price broke and it was high—very high on that kind of cotton.

Q. There had been a decline on cotton all that Fall, hadn't there?

A. Yes. I sold some and got a little over 40 cents f. o. b. Little Rock in August.

Q. What was the spot market?

A. The little rock quotation was 20 cents on middling—7/9's.

Q. You are giving your statement on your general recollection of the market at that time without having looked up the definite quotations?

A. Yes, I think the future market was around. I did look at it for this market but I have forgotten. I think it would run about nineteen cents, but I won't be positive of that.

Q. You think then that Mr. Black's statement——

A. Well, I believe I do know more about the selling end of the game. I am not saying this to discredit his statement—Mr. Black's statement. I know what cotton brings, and Mr. Black was working for Mr. McFadden, and he only represents the buying end—he don't sell any cotton at all the way I understand it—the cotton is sold out of Philadelphia and not sold out of the Little Rock Office.

Q. You are giving your testimony based on the selling end? [fol. 116] A. I am buying and selling.

Q. It is based on general recollection rather than a recollection of the actual examination of the records—the facts on that date?

A. I looked at the spot and also looked at the future. I don't know but I think it was around 19 cents. I know the base on an inch and a sixteenth cotton was very high. I know the big break in the market came after the November election—which was on November 4th, I believe—the first Tuesday in November, whenever that was. Of course, we had a pretty good break before then, but I know up until——

Q. In June was the spot market about 40 cents?
A. In July 43 cents.
Q. In October it was around 19 or 20 cents, and there was a considerable break before the November election.

Redirect examination.

By Mr. Marshall:

Q. You are satisfied that the figures you have given are correct for the dates given—October 21st?
A. Yes, sir; I looked.
Q. You looked it up?
A. I looked it up this morning. I think we bought cotton—I think we were paying around in the country—around 24 cents. I think we had 6,000 bales sold to Liverpool. I can't be positive about [fol. 117] the dates, but I know it was pretty active all through October and up until November. We were very active in that kind of cotton.
Q. It is a fact that usually the long staple commands a considerably higher price than the ordinary staple?
A. Well, it is governed altogether by the demand from the mills. Staple cotton never is hard to sell and brings a very small premium. Back in the spring of '20 staple cotton brought—when we were getting say 40 cents for upland, I sold an inch and sixteenth cotton for 68 cents. That will give you some idea—that is 18 cents a pound difference.
Q. You say in October 1920 that the long staple was still in demand and was selling considerable higher?
A. Oh, yes. Of course, it wasn't bringing such awful premiums as it had been bringing but it was still bringing a good round premium. An inch and a sixteenth cotton was worth all through October—we were buying it—we had to have it, and it was bringing around 400 points over middling or 7/8's cotton.

Recross-examination.

By Mr. Wiley:

Q. How would it be if it was one inch staple?
A. Inch staple would come down considerably—it was worth possibly a cent or a cent and a quarter higher—or a cent and half over [fol. 118] 7/8's. Possibly a cent and a half or a cent and a quarter, somewhere——
Q. It would be 21¼.
A. Yes, sir.
Q. You don't know what staple Warren was?
A. No, sir, I never heard of it.

Witness excused.

[fol. 119] AUGUST PROBST, a witness in behalf of the plaintiff, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. What is your name?
A. August Probst.
Q. What position do you occupy here?
A. Superintendent of the Little Rock Cotton Exchange.
Q. Do you keep a record of the middling upland cotton ordinary staple?
A. Yes, sir.
Q. What was the price on that on October 21, 1920?
A. On October 21st middling cotton was quoted at 20 cents.

No cross-examination.
Witness excused.

[fol. 120] R. C. GREGG, a witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. Your name is what?
A. R. C. Gregg.
Q. What business are you in?
A. I am with the Anderson-Clayton Company.
Q. In the cotton business?
A. Yes, sir.
Q. How long have you been in that business?
A. Since 1915.
Q. Can you state what was the market on full middling to good midding cotton 1 1/16 inch staple on October 21, 1920?
A. No, sir, not from my own knowledge.
Q. Do you keep any record or memorandum of sales and can show it in that way?
A. Yes, at that time I was with C. C. Burrow and I have here their sales book at that time. We have one sale on October 25th.

Mr. Wiley: I object to the sales book.
Mr. Marshall: It was an actual sale. Of course, if it was an ordinary sale it would be based on the market.
Court: If he knows the sale was made and the price at which it was made, why let it go in for what it is worth.

Q. What was the date of the sale?
[fol. 121] A. October 25th.
Q. What was the price the cotton brought?
A. 24 cents.

Q. That was the description that I have read to you——
A. It is strictly middling case. That is the same as the Liverpool grade he asked me about.
Q. What is the amount of the sale?
A. 300 bales.
Q. What market was that sale made in?
A. It was sold here in Little Rock.
Q. You say you can't from your own knowledge state what the market was at Memphis?
A. No, sir.

Cross-examination.

By Mr. Wiley:

Q. Who was the sale made to?
A. John Matlock & Son.
Q. What was the description of the cotton and the grade?
A. It was sold under Burrow type "Cash" strictly middling.

Mr. Marshall: What does that grade correspond to?

A. It is inch and a sixteenth cotton, not full but an inch and a sixteenth.
Q. Have you got a record of any purchases at that time?
[fol. 122] A. They have in the office. I haven't with me. I suppose they have if the books haven't been destroyed. I have not been with Burrow for two years.

Witness excused.

[fol. 123] C. M. Owens, a witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. What business are you in?
A. Cotton business.
Q. In Little Rock?
A. Yes, sir.
Q. How long have you been so engaged?
A. Three years.
Q. How long in all?
A. Nine years.
Q. How are you connected with the cotton business?
A. I am manager of the Dominion Textile Company, buyers.
Q. Can you state what was the market price of fully middling to good middling 1 1/16 inch staple on October 21, 1920?
A. Well, it is my idea upon the quotations of 7/8's and inch cotton at 20 cents, I think the fair price for strong middling 1 1/16 would be around 23 and a half cents.

Q. Have you brought any record showing any sales?
A. No, sir.
Q. You remember the market at that time, do you?
A. Yes, sir.
[fol. 124] Q. You remember how long staple cotton was selling as compared with other cotton?
A. Yes, sir.
Q. That's the Little Rock market. Can you state approximately what the Memphis market would be?
A. The difference in the freight rate which is about 12½ points.
Q. Which would make it how much?
A. About ⅛ or a ¼ of a cent above the Little Rock market.
Q. Do you know anything about the Earle market?
A. Well, it would be virtually the same as Memphis.

Cross-examination.

By Mr. Wiley:

Q. What was the price at that time of one inch staple?
A. It would be about ¾ of a cent above ⅞'s, or approximately 21 cents.
Q. You don't know what the staple Warren was?
A. No, sir; I don't.

Court: Full middling to good middling is the Liverpool description.

A. Yes, sir.

Witness excused.
The plaintiff here rested its case.

[fol. 125] This was all the evidence introduced in behalf of the plaintiff on the trial of the above entitled case.
This was all the evidence introduced in behalf of the defendant on the trial of the above entitled case.
This was all the evidence introduced by either plaintiff or defendant on the trial of the above entitled case.

DEFENDANT'S REQUESTED FINDINGS OF LAW

Thereupon, the defendant requested the court to make the following findings of law:

1

The verdict should be for the defendant.
(The Court refused to grant the defendant's requested finding of law No. 1, to which action of the Court the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

2

It is not necessary that option or choice, as between common law or limited liability, must be actually presented—that is to say, called to the direct attention of the shipper by the carrier at the time of the shipment.

[fol. 126] (The Court granted the above request for finding of Law No. 2, as requested by defendant.)

3

The acceptance by the shipper of the bill of lading with the limitation contained therein of exemption from liability for fire constitutes an assent by the shipper to that limitation.

(The Court refused to grant the defendant's requested finding of Law No. 3, to which action of the Court the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

4

An independent consideration for the exemption in the bill of lading from loss by fire is unnecessary—that is to say, a consideration independent of the transportation of the property.

(The Court refused to grant the defendant's requested finding of law No. 4, to which action of the Court the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

5

The provisions of the consolidated freight Classification No. 1 and schedules and tariffs of the carrier introduced in evidence are binding upon the shipper and the carrier also, regardless of whether the shipper had actual knowledge or notice of those provisions or not.

[fol. 127] (The Court granted the above request for finding of law No. 6, as requested by defendant.)

7

The rights and liabilities of the parties to this shipment depends upon federal legislation, the bill of lading and common law rules as accepted and applied in federal tribunals.

(The Court refused to grant the above request for finding of law No. 7, as requested by defendants, to which action of the Court the defendants at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

8

The Congress of the United States, by legislation, has entered the field of regulation of foreign commerce, and all statutes of the State of Arkansas are thereby superseded from application to shipments in foreign commerce; and this shipment and the rights and liabilities of the parties thereto are governed and determined by

Federal legislation and the common law rules as accepted and applied in the Federal tribunals.

(The Court refused to grant the defendant's requested finding of law No. 8, to which action of the Court the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.)

[fol. 128] Thereupon, the Court made the following finding of law, of its own motion:

The Court holds that Sections 843 and 844, C. & M. Digest of Statutes of Arkansas, apply to and govern the shipment of cotton involved in this case and therefore holds that the defendant is liable for the market value of the cotton at the place where and the time when it was delivered to the defendant.

(To the action of the Court in making the above finding of law, of its own motion, the defendant at the time duly excepted, and asked that its exceptions be noted of record, which was accordingly done.)

Findings of Fact

1

The Court finds the facts as stipulated in the written stipulation signed by the counsel for the parties and filed herein and also finds all other facts stipulated and agreed by counsel for the parties during the course of the trial.

[fol. 129] 2

The Court finds that the endorsements on the bill of lading which are provided by Rule No. 1 of the Consolidated Freight Classification No. 1 would not constitute an alteration or erasure of the bill of lading within the intent and meaning of Item No. 130 at page 39 of the cotton schedule, and that the provisions of said Item No. 130 were not intended to and did not operate as an exception taking the cotton exports out of Rule No. 1 aforesaid of the Consolidated Freight Classification.

3

The Court finds that the market value of the cotton at the place where and the time when it was delivered to defendant for shipment was $9,389.42.

(To the action of the court in making the above findings of fact Nos. 2, the plaintiff at the time duly excepted and asked that their exceptions be noted of record, which was accordingly done.)

Minute Entries

Thereupon, after holding the cause under advisement until August 30, 1923, the Court rendered judgment in favor of the plaintiff, to

which action of the Court the defendant at the time duly excepted, and asked that its exceptions be noted of record, which was accordingly done.

[fol. 130] Thereupon the defendant requested and was granted until Sept. 22, 1923, in which to file a motion for new trial, which within the time allowed by the Court was duly filed, and is in words and figures as follows, to-wit:

See Page No. — of Transcript for Motion for New Trial.

The Court Thereupon overruled said motion for new trial, to which action of the Court, the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done.

Thereupon the defendant prayed an appeal to the Supreme Court of Arkansas, which was granted, and defendant requested and was granted 90 days in which to prepare and file its bill of exceptions, which within the time allowed by the Court was duly filed.

IN CIRCUIT COURT OF PULASKI COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing bill of exceptions was on this 20th day of December, 1923, presented to me; was examined and found correct and it is therefore ordered to be filed as a part of the record in the above entitled case.

Marvin Harris, Judge 3rd Div. Pulaski Circuit Court.

O. K. J. C. M.
O. K. R. E. Wiley. 12-19-23.

[fol. 131] IN CIRCUIT OF PULASKI COUNTY

STENOGRAPHER'S CERTIFICATE—Filed Dec. 20, 1923

I, A. C. Jett, duly appointed and acting official court stenographer for the Third Division of the Pulaski Circuit Court, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcript of my stenographic notes, to the best of my knowledge and belief, taken at the hearing of the case of W. W. Porter and B. S. Weaver, doing business as Porter-Weaver & Company, plaintiff, vs. Missouri Pacific Railroad Company, case No. 15913, submitted for hearing in the above court on May 24, 1923, and I do hereby sign and certify to said typewritten pages in accordance with and as required by Section 1321 of Kirby's Digest of the Statutes of the State of Arkansas.

Witness my hand as such official court stenographer on this the 5th day of December, 1923.

A. C. Jett, Official Court Stenographer.

[File endorsement omitted.]

[fols. 132 & 133] IN CIRCUIT COURT OF PULASKI COUNTY

CLERK'S CERTIFICATE

STATE OF ARKANSAS,
County of Pulaski, ss:

I, O. L. McNair, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the foregoing transcript contains a true, correct and perfect copy of all of the pleadings and record entries in the case of E. W. Porter and D. S. Weaver, doing business as Porter, Weaver and Company, vs. Missouri Pacific Railroad Company, #15913, as the same appear of record and of file in my office.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of said Court, this the 11th day of January, 1924.

O. L. McNair, Circuit Clerk, by V. S. O'Neal, D. C. (Seal.)

Fees

Stenographer Tax	$3.00
O. L. McNair, Clerk ($8.20 Pd. by Plff. $.80 Pd. by Deft.)	8.45
Sheriff (Pd. by Plff.)	.60
Bill of Exceptions (Pd. by Deft.)	65.00
This Transcript (Pd. by Deft.)	7.80
Total	$84.85

[fol. 134] IN SUPREME COURT OF ARKANSAS

[Caption omitted]

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

vs.

E. W. PORTER and D. S. WEAVER, Doing Business as Porter, Weaver & Co., Appellee

Appeal from Pulaski Circuit Court, Third Division

SUBMISSION OF CAUSE—Jan. 12, 1925

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the

record and the briefs filed, and is by the Court taken under advisement.

[fol. 135] IN SUPREME COURT OF ARKANSAS

JUDGMENT—Feb. 16, 1925

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, Third Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellees recover of said appellant all their costs in this Court in this cause expended, and have execution thereof.

IN SUPREME COURT OF ARKANSAS

MINUTE ENTRY—March 2, 1925

The appellant having filed a petition for rehearing and brief, and duly served the same, said petition is passed by the Court for response brief and submission.

[fol. 136] IN SUPREME COURT OF ARKANSAS

OPINION—Feb. 16, 1925

HUMPHREYS, J.:

Appellees brought suit against appellant in the circuit court of Pulaski county, Third Division, to recover the value of seventy-five bales of cotton which they shipped from Earle, Arkansas, to Liverpool, England, on an export bill of lading, which was destroyed by fire while on the cars of appellant before its train left Earle.

Appellant interposed as a defense the following provision in the bill of lading:

"No carrier or party in possession of said property shall be liable for any loss thereof by causes beyond its control or by floods, or by fire, or by riots, strikes or stoppage of labor."

A jury was waived and the case was tried before the court, who rendered a judgment against appellant for $10,999.70, from which is this appeal.

The sole question involved on this appeal is the validity of the provision in the bill of lading, which exempts the carrier from liability for loss of the cotton by fire. The case was submitted upon the following agreed statement of facts raising that issue.

"On October 21, 1920, the Missouri Pacific Railroad Company received from Porter, Weaver & Company, at Earle, Arkansas, 75 [fol. 137] bales of cotton referred to in the petition, for shipment to Liverpool, England, and on said date issued to said shippers an export bill of lading, an exact copy of which is attached and made part thereof, consigning said shipment to shipper's order, Liverpool, England; that after the execution of said bill of lading, and before said cotton had been removed by the carrier from Earle, Arkansas, and while the same was on the cars of defendant, same was destroyed by a fire originating at the compress at Earle, Arkansas, and not set by defendant; that the only issue in the case is whether, in view of the execution of the bill of lading with the condition hereinafter referred to in regard to loss by fire, the carrier is liable for such loss and damage by fire; that said export bill of lading under and pursuant to which this shipment was made, provided that the carrier should not be liable for loss of said cotton occasioned by fire; that claim for the loss in question was timely filed and declined by the carrier, and suit thereafter was timely filed for said loss."

The provision in the bill of lading exempting appellant from liability on account of fire is a limitation upon appellant's common law liability and is void under Section 843 of Crawford & Moses' Digest if the shipment was controlled by the laws of the State.

Appellant contends that the shipment was governed by the Cummins Amendment of 1915 and 1916 to the Carmack Amendment [fol. 138] because the Cummins Amendment evidenced an intention on the part of Congress to occupy the field of regulating foreign commerce just as the Carmack Amendment evidenced its intention to enter the field of regulating interstate commerce. Congress has exclusive power to regulate both interstate and foreign commerce and when it has entered upon the field of regulating either, and does regulate either, the effect is that the regulatory acts of Congress upon the subject will supersede State statutes relating thereto, and all interstate and foreign shipments will be governed by Federal legislation and the common law rules as applied in the Federal courts. C. N. O. & T. Ry. Co. v. Rankin, 241 U. S. 327; So. Exp. Co. v. Byers, 240 U. S. 612; St. L. I. M. & S. Ry. Co. v. Starbird, 343 U. S. 592; Mich. Cent. R. Co. v. Myrie, 107 U. S. 102. Carriers are permitted under the law applicable in the Federal tribunals to stipulate their exemption from liability for loss by fire, except that it cannot exempt itself from consequences resulting from its own negligence. Hart v. Pa. R. R. Co. 112 U. S. 331. Liability in the instant case then depends upon whether the Cummins Amendment to the Carmack Act has covered the field of regulating commerce with foreign non-adjacent countries. The liability paragraph of the Carmack Act reads as follows:

"That any common carrier receiving property for transportation from a point in one State to a point in another State shall issue a [fol. 139] receipt or bill of lading therefor, and shall be liable to holder thereof for loss damage," etc. The Cummins Amendment inserted therein the following words: "or from any point in the United States to a point in an adjacent foreign country." Did the insertion of these words evince an intention on the part of Congress to cover the entire subject of regulating foreign commerce? We think not. The plain language of the amendatory act reflects that Congress was dealing only with commerce with adjacent foreign countries. There is not an indication in the amendatory act that Congress intended to regulate commerce with non-adjacent foreign countries. We think it inconceivable that Congress would manifest its intention to enter the field of regulating commerce with non-adjacent countries by indirection. We are unable to gather an intention on the part of Congress to regulate commerce with non-adjacent foreign countries because it enacted regulatory measures relating specifically to commerce between adjacent countries. Such an inference would be far-fetched and unreasonable. The subject of commerce with adjacent foreign countries and with non-adjacent foreign countries are separate and distinct, so it cannot be inferred that Congress in dealing with one subject intended to embrace both.

Since Federal laws have not been passed covering the field of regulation of loss in shipments of this character, the shipment is governed by Sec. 843 of Crawford & Moses' Digest. Our attention has [fol. 140] been called to paragraph 4 of Sec. 25, of Interstate Commerce Act as amended by the Transportation Act of 1920, (Fed. Stat. Ann. 1920 Supp. p. 124) in support of the contention that Sec. 843 of Crawford & Moses' Digest has been superseded by the Federal law. The only provision in the section relative to limited liability refers to a carrier by water and does not relate to the issue involved in this case of limited liability of an inland carrier.

Having concluded that the stipulation in the bill of lading exempting appellant from liability on account of loss by fire is void under Sec. 843 of Crawford & Moses' Digest which prohibits a carrier from limiting its common law liability as an insurer against loss by fire, it becomes unnecessary to discuss and decide other questions argued in briefs of learned counsel for the respective parties.

No error appearing, the judgment is affirmed.

[fol. 141] IN SUPREME COURT OF ARKANSAS

SUBMISSION OF PETITION FOR REHEARING—March 9, 1925

The petition for rehearing heretofore filed in this cause being now called, it is with the briefs filed and is by the Court taken under advisement.

[fol. 142] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed Feb. 28, 1925

Appellant, Missouri Pacific Railroad Company, respectfully ask a rehearing of this cause on the following grounds:

I. The court erred in deciding that Congress has not entered the field of regulation of foreign commerce so as to supersede State statutes which would otherwise apply to shipments between points in the United States and non-adjacent foreign countries.

II. The court erred in deciding that the rights and liabilities of the parties to this shipment are not governed by Federal legislation and the common-law rules as applied in Federal tribunals.

III. The court erred in deciding that the State statute of Arkansas, being section 843 of Crawford & Moses' Digest, applied to this shipment and rendered the exemption in the bill of lading from loss by fire void.

IV. The court erred in refusing to hold that by the Cummins Amendment to the Interstate Commerce Act, Congress has entered the field of regulation of foreign commerce so as to supersede all [fol. 143] State statutes which would otherwise apply to shipments like the one here involved.

V. The court erred in refusing to hold that by section 25 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, Congress has entered the field of regulation of shipments from points within the United States to points non-adjacent foreign countries so as to supersede the application of State statutes which would otherwise thereto apply.

VI. The court erred in refusing to hold that the stipulation in the bill of lading exempting a carrier from liability for loss by fire was valid and binding in this action.

By Act of June 29, 1906, known as the Carmack Amendment, Congress enacted that a common carrier receiving property for transportation from a point in one State to a point in another State should issue a receipt or bill of lading therefor, and be liable to the holder thereof for loss or damage caused by it or any connecting carrier. By this act Congress entered the field of the regulation of the liability of damages of common carriers in interstate commerce. By the act of March 4, 1915, known as the Cummins Act, Congress enlarged the Carmack Amendment by enacting that the same and some further enlarged provisions should apply also to transportation "from any point in the United States to a point in adjacent foreign country." By this Act, Congress entered the field of the regulation of liability for damages of common carriers in foreign commerce.

[fol. 144] We wish to emphasize that the authority of Congress to regulate transportation of property "from a point in the United States to a point in an adjacent foreign country" is referable solely to the grant of power to Congress by the Constitution of the United States "to regulate foreign commerce." The grant of power is a unit and indivisible, and when Congress has regulated any foreign commerce it has occupied the field of that grant of power in so fas as the subject matter of that regulation is concerned. In its opinion in this case the court distinguishes between commerce with adjacent countries and commerce with non-adjacent countries, using the language, "the subject of commerce with adjacent foreign countries and with non-adjacent foreign countries are separate and distinct;" but the Constitution makes no such separate grants of power as power to regulate commerce with adjacent foreign countries and commerce with non-adjacent foreign countries. It is all alike in commerce. When Congress exercises the power to regulate foreign commerce as to a certain subject-matter (the subject-matter in this case being liability of carriers for loss and damage to freight shipments) it has entered and occupied the entire field of foreign commerce so far as that subject-matter is concerned; and "its silence as to what it does not do is as expressive of what its intention is as the direct provision made by it."

Northern Pacific v. State of Washington, 222 U. S. 370; 56 [fol. 145] Law Ed. 237.

Southern Railroad Co. v. Railroad Commission, 236 U. S. 439; 59 L. Ed. 661-665.

N. Y. C. R. Co. v. Winfield, 244 U. S. 147; 61 L. Ed. 1045.

Southern Railroad Co. v. Reid, 222 U. S. 424; 56 L. Ed. 257.

The will of Congress upon the whole subject (of liability of carriers of foreign commerce) is as clearly established by what it has not declared as by what it has expressed, and the Arkansas statute has been superseded because Congress has entered the field. What "field" of power is entered? Not the field of "commerce between the United States and adjacent foreign countries," because there is no such field of power as that. It can only be the field of foreign commerce."

But if any doubt remained after the passage of the Cummins Act of Congress' intention it was removed by its enactment of the Transportation Act of 1920. By that act Congress amended the Interstate Commerce Act by addition of section 25. In the court's opinion in this case, it says: "The only provision in that section relative to limited liability refers to a carrier by water, and does not relate to the issue involved in this case of limited liability of an inland carrier," but that section reaches further than merely limited liability of water carriers; it provides regulations for the inland transportation in the United States of shipments destined from points within the United States to non-adjacent foreign countries, and paragraph four [fol. 146] of that section requires the railway carrier, in a shipment from a point in the United States to a point in a non-adjacent foreign country, to issue a through bill of lading to a point of destina-

tion, and provides the general character of that bill of lading, and it specifically provides that the Interstate Commerce Commission shall make such rules and regulations not inconsistent with the act as will describe the form of such through bill of lading.

The intent of the Congress to require a uniform bill of lading and to have the terms thereof prescribed by the Interstate Commerce Commission seems clear.

This enactment of Congress therefore speaks as to the identical character of shipment involved in this action, and covers the field of liability of the inland railroad carrier in such cases, because it gives the Interstate Commerce Commission power and authority to fix the terms and tenor of the railroad carriers' bill of lading as to terms not inconsistent with that act.

It is shown by the record in this case that the form of bill of lading used in this shipment containing the stipulation for exemption from liability for loss by fire, is provided in the carriers' schedule of rates, rules and regulations duly filed with the Interstate Commerce Commission. It must therefore be in force, at least until it has been annulled and declared unreasonable in a proper action for that purpose before the Interstate Commerce Commission. The law pro-
[fol. 147] vides a method for determining whether it is unreasonable and having it annulled or changed so as to make it reasonable by a proceding for that purpose before the Interstate Commerce Commission, and until that is done the courts are without jurisdiction to annul it, but it must be applied and complied with by shipper and carrier alike.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; 51 L. Ed. 553.

Not only that, but the Supreme Court of the United States has held that it is not even necessary for the carrier to prove that tariffs have been filed providing for the limitation in the bill of lading, because, in the absence of proof to the contrary, it will be conclusively presumed, from the fact that the carrier had actually issued its bill of lading containing the limitation of liability, that it had complied with all of the requirements of filing the tariff, etc., which were necessary to give it the right to issue the bill of lading on the ground (we quote from the opinion in the case next cited), "Where an act is done which could be legally done only after the performance of some prior act, proof of the latter carries with it presumption of due performance of the prior act."

American Railway Express Co. v. Lindenburg, 260 U. S. 584; 67 L. Ed. 227.

[fol. 148] Wherefore, appellant prays for rehearing, and that, upon rehearing, this court reverse and dismiss this action.

E. B. Kinsworthy, R. E. Wiley, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 149] IN SUPREME COURT OF ARKANSAS

ORDER DENYING PETITION FOR REHEARING—March 16, 1925

Being fully advised, the petition for rehearing filed in this cause, is by the Court overruled.

[fol. 150] IN SUPREME COURT OF ARKANSAS

CLERK'S CERTIFICATE

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the Missouri Pacific Railroad Company, Appellant, vs. E. W. Porter and D. S. Weaver, doing business as Porter, Weaver & Company, appellees, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this April 9, 1925.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

[fol. 151] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR WRIT OF ERROR AND ASSIGNMENTS OF ERROR

Considering itself aggrieved by the final decision of the Supreme Court of Arkansas in rendering judgment against it in the above entitled case, the appellant, Missouri Pacific Railroad Company, hereby prays a Writ of Error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of the supersedeas bond.

And said Missouri Pacific Railroad Company assigns the following errors in the records and proceedings of the said case.

1. The Supreme Court of Arkansas erred in deciding that the State Statute of Arkansas, being Section 843 of Crawford & Moses' Digest, was valid and applied to the shipment involved in this case and rendered void the exemption in the bill of lading from liability for loss by fire. The validity of said State's Statute was denied and drawn in question by the appellant on the ground of being in contravention of the Statutes and laws of the United States.

[fol. 152] 2. The Supreme Court of Arkansas erred in deciding that the rights and liabilities of the parties to this shipment are not gov-

erned by Federal legislation and the common law rules as applied in the Federal tribunals, including the Interstate Commerce Act with its amendments and the Transportation Act of 1920.

3. The Supreme Court of Arkansas erred in refusing to decide that by the Cummins Amendment to the Interstate Commerce Act, the Congress of the United States has entered the field of regulation of foreign commerce so as to supersede all State statutes which might otherwise apply to shipments such as the one involved in this case.

4. The Supreme Court of Arkansas erred in refusing to decide that by Section 25 of the Interstate Commerce Act as amended by the Transportation Act of 1920, the Congress of the United States has entered the field of regulation of shipments from points within the United States to points in non-adjacent foreign countries so as to supersede the application of State statutes which would otherwise thereto apply.

5. The Supreme Court of Arkansas erred in refusing to decide that the stipulation in the bill of lading exempting the carrier from liability for loss by fire was valid and binding in this action.

For which errors the appellant, Missouri Pacific Railroad Company, prays that the said judgment of the Supreme Court of the State of Arkansas be reversed and a judgment rendered in favor of the appellant, and for costs.

Robt. E. Wiley, Attorney for Missouri Pacific Railroad Company.

[fol. 153] IN SUPREME COURT OF ARKANSAS

ORDER ALLOWING WRIT OF ERROR—Filed April 6, 1925

Let the Writ of Error issue upon the execution of a bond by the Missouri Pacific Railroad Company to the appellees, E. W. Porter and D. S. Weaver, doing business as Porter-Weaver Company, in the sum of $15,000.00, such bond when approved to be as a supersedeas.

Dated March 31, 1925.

E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fols. 154 & 155] BOND ON WRIT OF ERROR FOR $15,000.00—Approved and filed April 6, 1925; omitted in printing

[fol. 156] IN SUPREME COURT OF ARKANSAS

WRIT OF ERROR—Filed April 6, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Missouri Pacific Railroad Company, and E. W. Porter and D. S. Weaver, doing business as Porter-Weaver Company, wherein was drawn in the question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said Missouri Pacific Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and a full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedin-s aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 31st day of March, in the year of our Lord one thousand nine hundred and twenty-five.

Sid. B. Redding, Clerk of the District Court of the U. S. for the Western Division of the Eastern District of Arkansas, by W. P. Feild, D. C. (The seal of the District Court, Western Division, U. S. A.)

Allowed March 31st, 1925. E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 157] IN SUPREME COURT OF ARKANSAS

CERTIFICATE OF LODGMENT

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on April 6, 1925, in the matter of The Missouri Pacific Railroad Company, a corporation, versus E. W. Porter and D. S. Weaver, doing business as Porter-Weaver Company,

1. The original bond of which a copy is herein set forth.
2. Copies of the writ *of the writ* of error, as herein set forth,—one for each defendant, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this April 9, 1925.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

[fol. 158] CITATION—In usual form, showing service on J. C. Marshall; filed April 6, 1925; omitted in printing

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[fol. 159] IN SUPREME COURT OF ARKANSAS

RETURN TO WRIT OF ERROR

UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this April 9, 1925.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of Supreme Court of Arkansas.)

Costs

Costs in circuit court	12.05
" " Supreme Court	99.30
" pursuant to Writ of Error	47.00

Paid by Missouri Pacific Railroad Company, plaintiff in error.

Endorsed on cover: File No. 31,163. Arkansas Supreme Court. Term No. 453. Missouri Pacific Railroad Company, plaintiff in error, vs. E. W. Porter and D. S. Weaver, doing business as Porter-Weaver Company. Filed May 11, 1925. File No. 31,163.

IN THE

Supreme Court of the United States

No. 107 OCTOBER TERM, 1926.

MISSOURI PACIFIC RAILROAD COMPANY, *Plaintiff in Error*,

v.

E. W. POSTEN AND D. S. WEAVER, DOING BUSINESS AS POSTEN WEAVER COMPANY, *Defendants in Error*.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD J. WHITE,
EDGAR B. KINSWORTHY,
HOMER E. KELLY,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

No.———— October Term, 1926.

Missouri Pacific Railroad Company.....*Plaintiff in Error*,

v.

E. W. Porter and D. S. Weaver, doing Business as Porter-Weaver Company.....*Defendants in Error*.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case involves a shipment of cotton from a point in Arkansas to Liverpool in England—a shipment in foreign commerce. The sole question is the validity of a provision in the railroad's bill of lading which exempts the carrier from liability for loss by fire.

This provision is at bottom of page 9 of record. Also see middle of page 9.

The Arkansas courts, refused to test the rights of the parties by the Acts of Congress and the rules of decision of the Federal courts, but held that the statutes of Arkansas

applied, and that according to that law the limitation of liability in the bill of lading was void. We contend that the court should have applied the statutes of the United States and the rules of decision of the Federal Courts, and under them should have held the limitation valid.

On October 21, 1920, the defendant in error delivered to the Missouri Pacific Railroad Company at Earle, Arkansas, 75 bales of cotton to be shipped from Earle to Liverpool, England. The carrier issued its export bill of lading signed by it and also by the shippers. It contained a provision that the carrier would not be liable for loss of the cotton by fire. The cotton was loaded into cars out of the compress at Earle, and that night the cars and the cotton were destroyed by fire which originated in the compress, and was not caused by carriers negligence. The sole ground claimed for recovery was carrier's common law liability as insurer, it being contended that the exemption from liability for loss by fire was void. Suit was brought in the Circuit Court of Pulaski County, Arkansas, for the value of the cotton. In defense the carrier set up the exemption in the bill of lading. The case was tried by the judge without a jury on an agreed statement of facts with some additional oral testimony.

At the trial plaintiff contended that the Arkansas statute (section 843 of Crawford & Moses' Digest), which prohibits limitation by carriers of their common law liability, should be construed to apply to this shipment and to render void the exemption in the bill of lading.

Defendant contended that thus construed the statute of Arkansas was invalid because superseded by acts of Congress regulating foreign commerce; that Congress having entered the field of regulation of foreign commerce, the statutes of the United States and the common law as accepted and applied in the courts of the United States governed the shipment and in shipments to non-adjacent foreign countries permitted contractual limitation of carrier's common law liability except against carrier's negligence, and there being no negligence here the limitation was valid.

Defendant in error requested the trial court to declare the law as follows:

"8. Congress of the United States by legislation has entered the field of regulation of foreign commerce, and all

statutes of the State of Arkansas are thereby superseded from application to shipments in foreign commerce; and this shipment and the rights and liabilities of the parties thereto are governed and determined by Federal legislation and the common law rules as accepted and applied in the Federal tribunals" (R. 71-72).

The court refused this request, and defendant saved its exception (R. 72).

The court declared the law as follows:

"The court holds that sections 843 and 844 of Crawford & Moses' Digest of the statutes of Arkansas, apply and govern the shipment of cotton involved in this case, and therefore holds that the defendant is liable for the market value of the cotton at the place where and the time when delivered to the defendant." The defendant objected and saved its exception to this ruling (R. 72).

The court gave judgment for the market value of the cotton for plaintiff against defendant (R. 72, 3).

The plaintiff in error filed and submitted in the trial court its motion for new trial, setting as grounds that the court erred in declaring the law as above set out, and in refusing defendant's request No. 8, and in finding the law in favor of plaintiff, and in giving judgment in favor of plaintiff and in refusing to give judgment in favor of defendant (R. 4).

The court overruled that motion, defendant saved its exception, and was granted an appeal to the Supreme Court of Arkansas (R. 5-6).

In the Supreme Court of Arkansas the above rulings of the trial were presented and affirmed. In its opinion the Supreme Court agreed that Congress has exclusive power to regulate foreign commerce, and that when it has entered the field its regulatory acts supersede all state statutes; but it held that Congress has not entered the field of the regulation of foreign commerce with non-adjacent foreign countries, and that that field was left open to regulation by the States and it construed the Arkansas statute aforesaid to apply to this shipment and to render the exemption from liability for loss by fire void (Court's opinion at pages 76 and 77 of the record and court's judgment at R. 75).

Plaintiff in error filed its petition for rehearing in the Supreme Court on the ground that the court had erred in deciding that Congress had not entered the field of regulation of foreign commerce so as to supersede state legislation which would otherwise apply to shipments between points in the United States and non-adjacent foreign countries, and in deciding that the Federal legislation and common law of Federal tribunals did not apply to the shipment, and in construing the State statute of Arkansas to apply to this shipment and to render the exemption void. And especially set up that the court erred in refusing to hold that by the Interstate Commerce Act as amended by the Cummins Amendment and by section 25 added by the Transportation Act of 1920, Congress has entered the field of regulation of foreign commerce so as to supersede all State statutes which would otherwise apply to shipments like the one here involved (R. 78).

The Supreme Court of Arkansas denied the petition for rehearing (R. 81).

On the ground that the validity of a State statute, as construed by the Arkansas State court was drawn in question because in contravention of the Constitution, statutes and laws of the United States and the decision was in favor of its validity as thus construed, plaintiff in error was granted a writ of error to this court by the Chief Justice of the Supreme Court of Arkansas (R. 82 and 83).

SPECIFICATION OF ERRORS.

The following errors were assigned and are relied on:

1. The decision that the Arkansas statute (Sec. 843 of Crawford & Moses' Digest) was valid and applied to this shipment and rendered void the exemption in the bill of lading.

2. The decision that the rights and liabilities of the parties to this shipment are not governed by Federal legislation and the common law as applied in the Federal courts, including the Interstate Commerce Act with its amendments, and the Transportation Act of 1920.

3. The refusal to decide that by the Cummins Amendment to the Interstate Commerce Act and by section 25 of

the Interstate Commerce Act as amended by the Transportation Act of 1920, the Congress of the United States has entered the field of regulation of shipments in foreign commerce so as to supersede all State statutes which would otherwise apply to shipments such as that involved in this case.

4. The refusal to decide that the stipulation in the bill of lading exempting the carrier from liability for loss by fire was valid and binding in this action (R. 81 and 82).

STATUTE OF ARKANSAS.

The following is the statute of Arkansas which was drawn in question in this case:

> "Contracts abridging liability. It shall be unlawful for any railroad or any of its agents or employees to enter into an agreement or contract with any shipper of any live stock, merchandise or other freight for the purpose of abridging, modifying, limiting, or abrogating the statutory and common-law duties and liabilities of such railroad as a common carrier, and all agreements and contracts made for that purpose are hereby declared to be void, and the same shall not be enforced by any of the courts of this State." (Crawford & Moses' Digest of 1921 of the Statutes of Arkansas, Sec. 843).

ARGUMENT.

CONGRESS HAS ENTERED THE FIELD OF REGULATION OF FOREIGN COMMERCE WITH RESPECT TO LIABILITY OF CARRIERS FOR LOSS AND DAMAGE, AND STATE STATUTES ARE THEREBY SUPERSEDED AND THIS SHIPMENT IS GOVERNED BY FEDERAL LEGISLATION AND THE COMMON LAW AS APPLIED IN FEDERAL COURTS.

Under this head we will combine and discuss all of the errors specified, adding a separate discussion also of the error last stated.

The Constitution of the United States provides that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Const. of U. S., Art. I, Sec. 8.

The power to regulate commerce given to Congress by the Constitution is exclusive, and a regulation of foreign commerce provided by Congress under that power is exclusive and supersedes the application of any State statute or rule.

Where Congress has entered the field and assumed control of the subject, the law applicable to every case within that subject is determined by Federal legislation and the common law rules as accepted and applied in Federal tribunals.

C. N. O. & T. P. Ry. Co. v. *Rankin*, 241 U. S. 327, 60 L. ed. 1022.

So. Exp. Co. v. *Byers*, 240 U. S. 612, 60 L. ed. 827.

St. L. I. M. & So. Ry. v. *Starbird*, 243 U. S. 592, 61 L. ed. 921.

Mich. Cent. R. Co. v. *Myrick*, 107 U. S. 102, 27 L. ed. 325.

The Arkansas Supreme Court accepted this principle and approved the foregoing authorities (R. 76), but it held that Congress had not entered the field. It distinguished between the field of foreign commerce with adjacent foreign countries and foreign commerce with non-adjacent foreign countries, and held that Congress had entered the field only of foreign commerce with adjacent foreign countries and had not entered the field of foreign commerce with non-adjacent foreign countries. It reasoned that the legislation of Congress had not covered the entire field of foreign commerce, or enacted any regulation inconsistent with the State statute with reference to the particular shipment here involved, and therefore Congress did not intend to enter the field (R. 77).

But the true rule is that it is not necessary for Congress to provide a rule inconsistent with the State statute nor that Congress should speak on the identical situation involved in the particular case. If it has entered the field, "Its silence as to what it does not do is as expressive as to what its intention is as the direct provision made by it."

Nor. Pac. v. *State of Washington,* 222 U. S. 370, 56 L. ed. 237.

So. R. Co. v. *R. R. Comm'n. of Indiana,* 236 U. S. 439, 59 L. ed. 661.

Vandalia Ry. Co. Public Serv. Comm'n. 242 U. S. 255, 61 L. ed. 276.

Charleston & W. C. R. Co. v. *Varnville Furn. Co.,* 237 U. S. 597, 59 L. ed. 1137, 1140.

Smithson v. *A. T. & S. F.,* 162 Pac. 111.

State of Missouri v. *Mo. Pac.,* 212 Mo. 658.

State of Washington v. *C. M. & St. P.,* 19 L. R. A. ns. 326.

We quote the following from the case of

So. Ry. v. *R. R. Comm'n,* 236 U. S. 439, 59 L. ed. 661, 665:

"For, as said in *Prigg* v. *Com.,* 16 Pet. 618, 10 L. ed. 1090: 'If Congress have a constitutional power to regulate a particular subject, and they do actually

regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere; and, as it were by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case the legislation of Congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. * * * The will of Congress upon the whole subject is as clearly established by what it has not declared as by what it has expressed."

N. Y. C. R. Co. v. *Winfield*, 244 U. S. 147, 61 L. ed. 1045, decided that, although the United States Employers Liability Act was silent as to Compensation where the carrier was not negligent, Congress had nevertheless by that Act entered the field of workmen's compensation, and therefore a State Compensation Act which provided compensation in cases where carriers were not negligent could not be applied. The United States Employers Liability Act required the master to compensate where the injury resulted from his negligence, it made no provision whatever for cases where the injury resulted without master's negligence. The New York Compensation Act required the master to compensate in cases where he was not negligent; it was sought to apply that New York statute to Winfield's injury, on the theory that Congress had not covered the point, and the State was thereby left free to make its own legislation. But the Supreme Court in the case cited held that, while the Act of Congress was silent as to that particular situation and the Act of Congress was therefore not inconsistent with the State statute, nevertheless Congress had entered the field, and the State statute was inapplicable.

In *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 56 L. ed. 257, the court said: "Inhibitive congressional legislation is not essential to exclude State legislation upon incidental matters relating to interstate commerce with respect to which the State and Congress have concurrent power. It is sufficient if the congressional legislation occupied the field of regulation."

Says another court: "The test is not whether State legislation is in conflict with the details of the Federal law or supplements it, but is whether Congress has entered the field, and if so all State laws relative to the same are superseded."

L. & N. R. Co. v. *State of Ala.*, 76 So. 505.

What is the field to be entered? It is the field of foreign commerce.

What is the subject to be regulated? It is the liability of carriers for loss and damage to freight shipments.

The court premised that the Cummins Amendment to the Interstate Commerce Act amended that provision of the act which made initial carriers liable for all damage, which formerly applied only to commerce between the several States, by adding commerce "from a point in the United States to a point in an adjacent foreign country," and from that premise decided that the Congress did not intend to enter the field which this shipment is in.

But the authority of Congress to regulate transportation of property "from a point in the United States to a point in an adjacent foreign country" is referable solely to the grant of power by the Constitution "to regulate foreign commerce." That grant of power is a unit and indivisible, and when Congress has regulated foreign commerce it has occupied the field of that grant of power in so far as the subject-matter regulated is concerned. The Constitution makes no such separate grant of power as power to regulate commerce with adjacent foreign countries and commerce with non-adjacent foreign countries. It is all alike foreign commerce, and when Congress exercises the power to regulate foreign commerce on a certain subject-matter (in this case, the liability of the carrier for loss and damage to freight shipments) it has entered the entire field of foreign commerce so far as that subject is concerned; and "its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it," within the meaning of the cases foregoing cited.

We further call attention that the State court overlooked the force of other legislation of Congress, since the Cummins Amendment, as bearing on the question, to-wit. Section 25 added to the Interstate Commerce Act by the Transportation Act of 1920. Said section 25 provides

regulations for the inland transportation in the United States of shipments in foreign commerce, including shipments to *non-adjacent* foreign countries, and paragraph 4 of that section requires the railway carrier in such a shipment to issue a through bill of lading to the point of destination, and provides the general character of that bill of lading, and specifically that the Interstate Commerce Commission shall make such rules and regulations not inconsistent with the act as will prescribe the form of all such through bills of lading.

41 Stat. L. 497-498. (Paragraph 4 is at p. 498).
Fed. Stat. Ann. 1920 Supp. 123-124. (Paragraph 4 is at p. 124).

The intention of Congress to require a uniform bill of lading for shipments from the United States to non-adjacent foreign countries and also to have the terms thereof prescribed by the Interstate Commerce Commission seems clear. This enactment speaks as to the identical character of shipments involved in this action, and in effect it covers the subject of liability of the inland railroad carrier in such shipments, because it gives the Commission power to fix the terms of that carrier's bill of lading so far as not inconsistent with the statute.

The form of bill of lading used in the shipment containing the exemption of liability from loss by fire is provided in the carrier's schedule duly filed with the Interstate Commerce Commission. It is in force at least until it has been declared unreasonable in the proper case for that purpose before the Commission. The law provides a method for determining whether it is unreasonable, and for having it annulled or changed so as to make it reasonable, by a proceeding for that purpose before the commission, and until that is done the courts are without jurisdiction to annul it, but it must be applied and complied with by shipper and carrier alike.

Texas & Pac. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553.

Am. Ry. Ex. Co. v. *Lindenburg*, 260 U. S. 584, 67 L. ed 414.

But even if this provision of the Transportation Act of 1920 be not construed so as of itself to provide authority to authorize carriers to exempt from liability for loss by fire, and if it be construed as being silent on that particular

point, still it emphasizes the intention of Congress by both these enactments, the Cummins Amendment and this provision of the Transportation Act of 1920, to enter the field of regulation of foreign commerce and to cover that field in so far as liability of carriers for loss or damage is concerned, and its silence as to what it does not do in that respect is as expressive of its intention as the affirmative provisions made by it.

By the Interstate Commerce Act Congress entered the field of regulation of interstate commerce as to certain subjects.

4 Fed. Stat. Ann. 2d ed. 337.

But the court held that the subjects and these regulations did not reach and did not intend to cover the subject of the liability of carriers for loss and damage. By the Carmack Amendment to that act Congress entered the field and covered the subject of the liability of carriers for loss and damage in interstate commerce.

Act of June 29, 1906; 34 Stat. L. 595.

After that amendment the subject of liability of carriers for loss and damage in interstate commerce was not subject to State statutes. Counsel for defendants in error conceded that; in fact affirmatively averred in their trial brief that after the Carmack Amendment "the Supreme Court held in many cases whose effect has never been in the least disturbed that the State laws as to carriers' liability in interstate shipments were no longer applicable."

It is our contention that by the enactment of the Cummins Amendment (Act of Mar. 4, 1915, ch. 176; and Act of Aug. 9, 1916, ch. 301; 39 Stat. L. 441; 1918 Supp. Fed. Stat. Ann. 387) and section 25 added to the Interstate Commerce Act by the Transportation Act of 1920 (Fed. Stat. Ann. 1920 Supp. 123-124) Congress entered the field of foreign commerce and covered the subject of carriers' liability for loss and damage in foreign commerce. The Cummins Amendment and the aforesaid section 25 added by the Transportation Act of 1920, considered together with the Interstate Commerce Act as a whole, evinces a settled intention on the part of Congress to occupy fully the field of regulation of interstate and foreign commerce as to the subject-matter of carriers' liability for loss and damage, and the mere fact that the regulatory acts are silent with reference to prohibiting

contracts which limit common-law liability in shipments from United States to non-adjacent foreign countries does not leave it open to the States to make a rule on that point. It is the will of Congress that governs. Congress may make the prohibition of limitation of common-law liability applicable to certain transportation and withhold its application from others. There might be reasons for distinguishing in that respect between shipments to non-adjacent and to adjacent foreign countries. There might be good reasons for applying the prohibition to the one and withholding it from the other. It was the privilege of Congress when it entered that field of regulation to make that distinction. It has done so. But nevertheless its entry into the field of regulation of foreign commerce with reference to that subject is as definite and as paramount over every situation of transportation in foreign commerce as if it had applied that prohibition to shipments to non-adjacent foreign countries. The situation here is just as frequently occurred in the foregoing cited cases, on which we rely, that is, we do not have to show a statutory provision inconsistent with the particular statute of the State which is sought to be applied, but we have only to show that Congress has entered the field of regulation of foreign commerce with reference to that subject. Congress having done so, the State laws are no longer applicable.

THE APPLICABLE FEDERAL LAW PERMITS THE CARRIER TO STIPULATE FOR EXEMPTION FROM LIABILITY FOR LOSS BY FIRE.

There being no applicable statutory provision among the statutes of that power which has lawfully assumed the regulation of that commerce, the general rules of the common law as applied by the courts of that power govern the shipment.

Counsel argued that we are faced with the dilemma of choosing between the congressional prohibition contained in the Cummins Amendment against restricting common law liability and the application of the State law to the shipment. Not so; because neither is applicable to the shipment. The State statute is not applicable because Congress has entered the field of regulation of foreign commerce and all State statutes are foreign and are superseded. The regulatory statute of Congress (the

Cummins Amendment) has seen fit by its silence to exclude shipments such as the one here from its prohibition against restricting common-law liability. There remain the rules and principles of general law as applied by the courts of that power which has lawfully assumed the regulation of foreign commerce to the exclusion of the States; and that is the law which is applicable.

In *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, the Supreme Court says that the rule of carrier's liability in an interstate shipment was "(1) either that of the general common-law as declared by this court and enforced in the Federal courts throughout the United States; or (2) that determined by the supposed public policy of the particular State; or (3) that prescribed by the statute law of the particular State." To sustain the statement there made that the rule of carrier's liability was "that of the general common law as declared by this court and enforced in the Federal courts throughout the United States," the court cites *Hart* v. *Pa. R. Co.*, 112 U. S. 331, 28 L. ed. 717, where this court said:

> "It is the law of this court that a common carrier may by special contract limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants" (See p. 720 of 28th L. ed.).

For its authority for (2) above in Croninger case—application of the supposed public policy of the particular State, *Penn R. Co.* v. *Hughes*, 191 U. S., is cited; and for its authority for (3) above—the application of the statute law of the particular States, *C. M. & St. P. R. Co.* v. *Solan*, 169 U. S. is cited. Those are two cases chiefly relied on by defendant in error, and they hold that where Congress ***has not*** entered the field of regulation of carrier's liability the State statute applies. But those two cases are not authority where Congress ***has*** entered the field of regulation. Counsel for plaintiff must and does concede this.

It being established that the general law as declared by this court and other Federal courts furnishes the rule for determining the rights and liabilities of the parties, what is the applicable rule of that general law? *Hart* v. *Penn R. Co.*, *supra*, furnishes the answer where it says: "It is the law of this court that a common carrier may by

special contract limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants."

The rule has been applied specially to cases of exempting the carrier from loss on account of fire.

Cau v. *T. & P. R. Co.*, 194 U. S. 427, 48 L. ed. 1053.

In the Cau case it was held that the provision in the bill of lading exempting the carrier from liability for loss by fire was valid, and that no reduced rate as a consideration therefor is necessary. Transportation of the goods—that is, the consideration which supports the bill of lading itself—is sufficient.

Cau v. *T. & P. Ry. Co., supra.*

In another case this court held that such a stipulation exempting from loss by fire is valid regardless of allegations of duress, unreasonableness and lack of consideration; and although regular freight rates were charged and no option was given the shipper to receive any other form of bill of lading.

Arthur v. *T. & P. R. Co.*, 204 U. S. 505, 51 L. ed. 590.

The United States Circuit Court of Appeals for the Eighth Circuit held that the provisions of a bill of lading exempting a carrier from liability caused by riots was valid, and that under those provisions the carrier was not liable for loss by fire caused by riots.

Simmons Hdw. Co. v. *So. R. Co.*, 279 Fed. 929, 933.

In fact, plaintiff's counsel admitted in his trial brief that if the State statute be not applied "the initial carrier in this case had a right, if it proceeded properly, to limit its liability for loss by fire, as it tried to do in this case." We think it clear that the State statute is not applicable, and therefore counsel's concession becomes our argument, that by proceeding properly the carrier could limit its liability as it tried to do in this case.

NO SPECIAL REDUCED RATE IS NECESSARY TO SUPPORT THE STIPULATION EXEMPTING FROM LIABILITY FOR LOSS BY FIRE.

On this point we call the court's attention to the case of *Cau* v. *T. & P. Ry. Co.*, 194 U. S. 427, 48 L. ed. 1053, which was a case of loss of goods by fire while being transported, and in which the Supreme Court enforced the provision in the bill of lading exempting the carrier from liability for loss by fire. This court there specifically held that the transportation of the goods, that is to say the consideration which supports the bill of lading itself, is sufficient consideration for the stipulation, and that no reduced rate as a special consideration for said stipulation was necessary to support it. That rule has never been departed from by the Supreme Court, and in any case where the limitation is permissible that rule is the applicable rule so far as the consideration is concerned, and makes it unnecessary for carrier in the case at bar to show that two rates were offered or that any special reduced rate was provided in consideration of the limited liability contract.

The case of *Un. Pac. R. Co.* v. *Burke*, 255 U. S. 317, is not in conflict with the rule above announced in *Cau* v. *T. & P. Ry. Co.* In the Burke case the damage was occasioned by negligence of the carrier. In the case at bar it is not contended that the carrier was negligent.

NEVERTHELESS IN OUR CASE A REDUCED RATE AS A SPECIAL CONSIDERATION FOR A LIMITED LIABILITY CONTRACT WAS PROVIDED, AND SHIPPER HAD HIS CHOICE TO SHIP WITH COMMON-LAW LIABILITY OR WITH LIMITED LIABILITY AT A LOWER RATE.

The carrier's cotton tariff and also Consolidated Freight Classification No. 1, both of which were duly filed and published according to law, are in evidence and provide a choice to the shipper to ship his cotton at a reduced

rate in consideration of a limited liability service or at a higher rate with an unlimited common-law liability service.

The cotton tariff provides on its title page that it is governed except as herein otherwise provided, by the provisions of Consolidated Freight Classification No. 1. (R. 28, 27, 52). And the testimony of Mr. Aylin, the freight traffic man for appellant, says that the Consolidated Freight Classification No. 1 is the volume of rules covering transportation of freight and the grading of the various commodities and placing them in proper classes for transportation, and that it is a necessary adjunct to a tariff. It contains the rules governing transportation of freight and governing the grading and classification of various commodities for transportation purposes. (R. 60-61).

These documents must be construed together to accomplish the purpose for which they are intended, namely, to fix the rates and all the rules and regulations of the carrier which in anywise affect the value of the service to be rendered by the carrier to the shipper or the amount to be charged therefor, within the meaning of the Interstate Commerce Act which requires the carrier to establish and file such schedules.

Rule No. 1 of the Consolidated Freight Classification No. 1 very clearly provides that a shipper either of interstate traffic or of export traffic may ship with common-law liability service or with limited liability service; it gives the shipper the option or choice to ship his goods at his own election either one way or the other (R. 23-24). It provides that if he desires to ship with an unlimited common-law liability service he shall so notify the agent at the time he delivers his goods for transportation, and that is all the obligation that is put upon him in order to get that service. If he so notifies the agent he gets that service and pays for it the rate which is provided in the cotton tariff, plus 10 per cent of said rate. If he does not notify the agent he desires to ship with unlimited common-law liability service, this Rule One provides that it will be understood by his failure so to notify that he desires to ship according to the terms and conditions of the limited liability export bill of lading or interstate bill of lading, as the case may be, and the shipment will be made accord-

ingly and the rate charged will be the reduced rate provided in the schedule—that is, the rate provided in the schedule without any addition of ten per cent thereof.

It also provides the method whereby the fact that the shipment is to move under unlimited common-law liability shall be evidenced; that is to say, that when the agent is notified by the shipper that he elects to ship with unlimited common-law liability service, the carrier's agent shall stamp or print or write on the face of the bill of lading a notation to that effect, and the very language of the notation is provided in this rule, and that the agent shall sign it, and the shipment shall then move with unlimited common-law liability service.

Counsel argued that ths rule was not applicable to export shipments because of a provision in the cotton tariff (item 130, p. 39) that a certain printed form of bill of lading shall be used and that the bill of lading shall be free from alterations and erasures (R. 17-18). He argued that this provision in the cotton tariff constituted an exception which took export shipments out of Rule One of Consolidated Freight Classification No. 1, within the intent and meaning of the reservation of the title page of the cotton tariff, which provided that it was "governed, except as herein otherwise provided," by Consolidated Freight Classification No. 1.

But, in the first place, the trial court made a finding of fact contrary to that contention (R. 72), and that finding was not disturbed by the Arkansas Supreme Court (R. 75-77).

So the case will be considered by this court on the basis of the facts that "the endorsements on the bill of lading provided for by Rule 1 of Freight Classification are not an alteration or erasure and item No. 130 does not operate as an exception taking the cotton exports out of Rule 1 aforesaid (R. 72).

But, if that question be open here, we submit that the stamping on the bill of lading of the matter provided in Rule One of the Consolidated Freight Classification No. 1 duly authenticated by the signature of the agent issuing the bill of lading before it is issued, is entirely consistent with that bill of lading being free from alterations or

erasures. The language relied upon by plaintiffs is "all bills of lading must be free from alterations or erasures." The direct and ordinary acceptance of language is the criterion for construction. No draftsmen of a document would use such language as the quoted item for the purpose of evidencing an exception to Rule No. 1. It has a direct and commonly accepted meaning and purpose apart from evidencing such an intention. It is to protect the carrier from forgeries and unauthorized provisions; to prevent changes after the bill of lading was issued and became a binding document, so as to avoid disputes between the holders of the bill and the carrier. A strained and unusual and hidden meaning would have to be attached to the language to make it intend an exception to the Freight Classification within the language of the title to the cotton schedule, "except as otherwise provided herein;" certainly more direct and commonly accepted language for the purpose would be used than the language quoted to indicate such an exception.

Also when the meaning of the words is considered strictly there is no basis for construing the language as a prohibition in conflict with Rule No. 1. Clearly the stamping as provided in Rule No. 1 is not within the ordinary acceptation of the word "erasure." Likewise it is not within the ordinary commonly accepted meaning of the word "alteration." The word "addition" would have been nearer to describing the provisions in Rule No. 1. Had the language been "all bills of lading must be free from alteration, erasures or *additions*," a more reasonable argument might be made for plaintiff's contention; but it would not have been a sound argument, because other language could have been so readily used to convey by its ordinary acceptation an exception to Rule No. 1.

Counsel's contention, logically carried out, would prevent the addition of the weight or the description of the shipment, or the directions for icing in transit, or the directions for protection against cold in transit, or the rate of freight.

The construction of the language is for the court. There are no words of art and no words of a technical meaning. The whole of the document must be construed together, and effect given to all parts thereof. It would

be contrary to the rule that all parts of an instrument must be given effect, and would be unreasonable to construe away the application of Rule No. 1 on the strength of the language of this item No. 130 prohibiting alterations or erasures.

We submit that the compliance with Rule No. 1 by stamping on the face of the proposed bill of lading a provision which was to be authenticated by the signature of the carrier's agent before the document became an executed bill of lading, was not an alteration or erasure within the meaning of item No. 130.

Nor is counsel sound in his argument that the agent had no choice in the use of bill of lading. He had the same choice as he had of rates. The cotton schedule provided for one rate, just as it did for one form of bill of lading; but the schedule itself on its very title page provided that it was governed by the Consolidated Freight Classification, and that Freight Classification by Rule No. 1 provided for an additional and different rate, and in the same way provided for an additional form of bill of lading. It is shown by the forms put in evidence by plaintiffs themselves that all the forms involved were identical, that they had the same provisions limiting carrier's liability and exempting carrier from damage from loss by fire (R. 51, 18, 22, 44, 46, near top, 8).

The method of providing a different rate by horizontal percentage increase as in Rule No. 1 herein is a common practice with carriers, and has been approved by this court.

In *M. K. & T. R. Co.* v. *Harriman Brothers*, 227 U. S. 657, 57 L. ed. 890, a tariff provided that "one hundred twenty per cent of the rates named in this tariff will be charged on shipments made without limitation of carriers liability at common-law," was held valid as providing a choice to shippers between two rates.

The Supreme Court has also held a provision sufficient to give shipper a choice between rates, which fixed a rate of $95 per car for mules valued not more than $75 each, and an increase of 50 per cent in the rate of each 100 per cent increase or fraction thereof in value.

C. N. O. & T. P. R. Co. v. *Rankin*, 241 U. S. 319; 60 L. ed. 1022.

The numerous cases cited by counsel before the State courts to the effect that no matter what the contract contains if an opportunity for unlimited liability is not afforded the restricted contract is inoperative, have no bearing on this case. Choice was afforded the shipper in this case. The filed tariffs, to-wit, the cotton schedule and the freight classifications together providing the two rates, were published. They were both filed with the Interstate Commerce Commission. They must both be considered, because the cotton schedule recited on its little page that it was governed by the Consolidated Freight Classification. They provided a choice to the shipper of the two rates, one attaching to carrier's liability limited only as by common law, and the other attaching to the limited liability contract. The facts that no shipper had chosen the higher rate and that the agent had never issued a bill of lading for the higher rate, have nothing to do with the matter. The higher rate with its unlimited liability was there for the shipper, and he had the right to call for it, and he is charged with the knowledge of it and must call for it if he wants it. Not calling for it, he is conclusively presumed to have chosen the other rate. He cannot be heard to say that he did not know the provisions of the filed tariffs. That is well settled. This court has said:

> "He (shipper) must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed is notice and its effect is not lost although, it is not actually posted in the station."

K. C. S. R. Co. v. *Carl*, 227 U. S. 639, 652; 57 L. ed. 683, 688.

T. & P. v. *Mugg*, 202 U. S. 242; 50 L. ed. 1011.

Am. Ry. Exp. Co. v. *Lindenburg*, 67 L. ed. 414.

It has been held with reference to contractual limitations respecting released valuations that the shipper does not have to sign the receipt nor otherwise sign a writing declaring the reduced value, where the tariff authorizing the limitation has been filed.

Am. Ry. Exp. Co. v. *Lindenburg, supra.*

That case also declared that a carrier did not even have to prove the filing of the tariffs with the Interstate Commerce Commission containing the reduced rate or the limitation of liability or the authority therefor, where the state of proof showed that the carrier had actually issued its bill of lading or receipt showing and containing the limitation of liability. It was so held on the theory that (quoting from the opinion of the court), "where an act is done which could be legally done only after the performance of some prior act, proof of the latter carries with it presumption of due performance of the prior act."

In the Mississippi case of Hill, cited by counsel in the State courts, there was no showing that any tariff was filed providing for a limitation. The only provision shown in the case for a limitation was provision in the bill of lading itself. And the Mississippi court based its decision on the fact which it said appeared to the court's satisfaction—"because the railroad company had never filed any such rate with the Interstate Commerce Commission as required by law." The case is no authority here, where it is admitted that the tariff with such provision in it was filed and published according to law. The shipper is conclusively bound to take notice of them, as also is the carrier and its agents. It therefore affirmatively appears that the shipper was afforded a choice of rates. Certainly the state of the proof altogether falls far short of sustaining the burden of proof which was on the shipper to show that the rates were not filed and no choice was given, within the meaning of the rule declared in *C. N. O. & T. P.* v. *Rankin*, 241 U. S. 317, 60 L. ed. 1022, 1026.

The numerous cases cited in plaintiff's trial brief, holding in substance that the lawful rate is the one fixed by the filed tariffs and is binding upon the carrier, agent and shipper alike, and which culminate in the holding that the rate so filed and published is as fixed and unalterable as if it had been established by special act of Congress—that is, that it is equivalent to a statute binding both parties—serve but to emphasize the binding character of the schedules and rules of the freight consolidation, all together. Counsel argued that such statute cannot be put in force by a rule of the company, but only by a schedule filed and published as required by law. But such a statute is put

in force by the rule of the company, for every rate originates by the action of the carrier in establishing and printing that rate. The law requires that the rate shall be established and printed by the carrier and then filed by the carrier with the Interstate Commerce Commission, and then published according to law. The provisions of the Interstate Commerce Act regulate the establishment of the rate so as to make it binding as a statute, within the meaning of the decisions cited by counsel, and that Act provides also for the establishment of rules and regulations, and when such rules and regulations are established, filed and published, they are as binding as a statute and are as binding as the rates. Section Six of the Interstate Commerce Act provides for the establishing and filing of the schedules. Its requirement is that the carriers shall file with the Commission "schedules showing all the rates, fares and charges for transportation;" and that these schedules "shall contain the classification of freight in force and state all terminal charges, * * * and all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part of or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the shipper or consignee."

It will thus be seen that the consolidated freight classification and the rules and regulations are just as clearly authorized and binding and have the same authority as the rates themselves.

Boston & Me. R. Co. v. *Hooker*, 233 U. S. 97, 58 L. ed. 868.

There is no basis for counsel's attempt to distinguish between the *rates* and the *rules*. Rule No. 1 of Consolidated Freight Classification and the cotton schedule together have the force of a statute, even under the authorities cited by counsel; and when the ordinary rules of construction of statutes are applied all parts must be given effect, and it is clear that provision is made for two rates, and that under the authorities the shipper had the choice afforded him between those rates, regardless of any actual lack of knowledge as to the provisions of the schedule and the classification; and that the State statute prohibiting limitation of the common-law liability is inapplicable to this

case because Congress has entered the field, but that Congress in its discretion having declined by statute to prohibit the limitation of liability as to shipments to non-adjacent foreign countries, the general principles of law as declared by the Federal courts govern; and these general principles permit the exemption of carrier from liability for loss by fire; and that therefore the limitation in the bill of lading in this case is valid, and plaintiff cannot recover.

EDWARD J. WHITE,
EDGAR B. KINSWORTHY,
ROBERT E. WILEY,
Attorneys for Appellants.

Dated Little Rock, Arkansas, Sept. 1, 1926.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

MISSOURI PACIFIC RAILROAD COMPANY, Plaintiff in Error, vs. E. W. PORTER and D. S. WEAVER, Doing Business as PORTER-WEAVER COMPANY, Defendants in Error.	No. 107.

REPLY OF PLAINTIFF IN ERROR TO BRIEF FOR APPELLEES.

1.

Congress, Through the Interstate Commerce Act, Has Assumed Jurisdiction Over Both the Form and Substance of Bills of Lading.

Counsel for defendants in error argues, in effect, that had the Carmack and Cummins Amendments been omitted from the Interstate Commerce Act at the time this ship-

ment moved the state statute prohibiting the insertion in a bill of lading of any limitation of common law or statutory liability would have been applicable not only to the inland portion of a shipment to a nonadjacent foreign country, but, likewise, to commerce between states. In support of this he cites and relies upon Ry. Co. v. Solan, 169 U. S. 133, and Ry. Co. v. Hughes, 191 U. S. 477.

This argument ignores the numerous changes that have been made in the Act since 1906 in addition to the Carmack and Cummins Amendments.

In contrast to the simple and limited statute that was under review in the Hughes case, above cited, we need only quote from subdivision 6 of section 1, as it has existed since February 28, 1920 (1920 Supp. Fed. Ann. Statutes, p. 95):

> "*It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe and enforce* just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and *just and reasonable regulations and practices affecting* classifications, rates or tariffs, *the issuance, form and substance of* tickets, receipts and *bills of lading*, the manner and method of presenting, marking, packing and delivering property for transportation," etc. (Italics ours.)

Unlike the Cummins and Carmack Amendments, Section 1, from which we have just quoted, is applicable to

the inland portion of a shipment to a non-adjacent foreign country.

Opposing counsel, on page 20 of his brief, has gone outside of the record to inform us that this cotton was intended to move in an English vessel, and that, therefore, Subdivision 4 of Section 25 of the Act to Regulate Commerce, which authorizes the Commission to prescribe the form of through bills of lading in connection with registered American ships, is inapplicable. If section 25 of the act stood alone, it might present a doubtful question as to whether Congress had intended to occupy the entire field respecting regulations to be contained in export bills of lading for use by both registered American vessels and foreign vessels not so registered.

But reading this section in connection with Subdivision 6 of Paragraph 1 of the Act, it is obvious that Congress has specifically and directly occupied the field with respect to the substance of bills of lading covering the inland portion of export shipments to nonadjacent foreign countries.

The Commission, by Subdivision 1 of Section 15 of the Act, has, since February 28, 1920, had authority to regulate and prescribe the rules and practices contained in such bills of lading (1920 Supp. Fed. Ann. Statutes, p. 107).

That the Commission may not have acted under this authority at the time this shipment moved in October, 1920, is immaterial, for, as stated by this Court in the

recent case of Napier v. Atlantic Coast Line, decided November 29, 1926:

> "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the act delegating the power. We hold that the state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field."

2.

No Consideration Needed to Support Such a Limitation.

Opposing counsel cites and relies upon the case of Ry. Co. v. Burke, 255 U. S. 317, in support of his contention that such a limitation must be supported by a reduced rate (Appellees' Brief, p. 34). The Burke case involved limitation of value with respect to damage occasioned by the carrier's negligence in connection with the inland portion of an import shipment moving during March, 1915. The amendments to the Commerce Act, by the Transportation Act of 1920, gave the Commission jurisdiction over the substance of the inland portion of bills of lading. Proof of some consideration or estoppel is, therefore, no longer necessary to support any valid common-law limitation which the Commission has permitted to become effective, for the element of risk is one of the elements that enter into rate-making. Congress, itself, could limit common-law liability, and the Commission, where such au-

thority is specifically delegated to it, can exert the same power. In doing so, the Commission is of course bound to respect the provisions of the Carmack and the Cummins Amendments, the provisions of the Harter Act, the provisions of the Federal Bill of Lading Act, and any other such specific enactments, but outside the scope of these particular acts, it has unlimited authority to prescribe the substance and regulations to be printed in bills of lading, and can determine for itself whether further rules should or should not be provided giving the shipper the option to ignore such regulations and ship at common-law liability.

This case does not involve a limitation respecting damage occasioned by the carrier's own negligence, but simply applied the same rule to the inland portion of this export shipment as was permissible under the Harter Act to the ocean portion, namely, freedom from liability for loss by fire occasioned through no negligence of the carrier (Rec., p. 7).

3.

Defendants in Error Are Estopped From Denying the Validity of the Bill of Lading Upon the Terms of Which They Must Rely to Make Out Their Case.

We deem it unnecessary to say anything further in support of the validity and application of Rule 1 of the Consolidated Classification.

Assuming, for the sake of argument, however, that opposing counsel is correct in stating that the bill of lading is void for lack of some tariff requirement, yet the fact remains that to make out their case defendants in error must rely upon this same bill of lading, a portion of which they attempt to repudiate.

The bill of lading in question under the facts in this case gave the shippers certain privileges and rights which were not accorded them at common law, and, at the same time, imposed upon them certain restrictions in the nature of limitations of the carrier's common-law liability. The acceptance and reliance upon the provisions of this bill of lading, which imposed upon the carrier a greater liability than existed at common law, estops the shippers from repudiating the provisions which restricted the common-law liability.

The bill of lading, which was signed by the shippers without protest, among other things provided that loss or damage to the shipment should be computed on the value of the property at the place and time of shipment (Rec., p. 10), and further provided that the carrier should not be liable for loss by fire (Rec., p. 9). The undisputed evidence discloses that the market on cotton during the latter part of October, 1920, was rapidly declining, and that the market virtually went to pieces immediately after the November election (Rec., p. 66). To settle on the value at time and place of shipment rather than on the value at Liverpool at the date this shipment was due to arrive

there, presumably several weeks later, was materially to the shippers' advantage. They accepted this bill of lading without protest, and, had the shipment been destroyed in a wreck, would have greatly profited by this provision of the bill of lading. The shippers not only accepted the bill of lading without protest, but here rely upon this provision of the bill of lading to make out their case, for the record is absolutely silent as to the value of this cotton under the common-law rule, namely, the value at destination at the time and in the condition that it should have been delivered. *Defendants in error have either failed to make out a case because of the lack of proof respecting the destination value of this cotton, or must invoke the aforesaid section 2 of the very bill of lading they are attempting to repudiate.* Relying upon the bill of lading for the purpose of obtaining an advantage that would not be accorded them at common law, the shippers are estopped from repudiating the terms of the same shipping contract which are to their disadvantage.

The reasoning of this Court, in the Burke case, 255 U. S. 321, applying the principle of estoppel to a shipper who is bound by a limited liability provision because of having accepted a reduced rate, is equally applicable to a case of this kind, where the shippers, to make out their case, rely upon certain terms of the contract which accord them greater rights, or, at least, different rights, from those they would be entitled to at common law.

It is true that our answer sets forth the provisions of the shipping contract fixing value as of the time and place of shipment (Rec., p. 3), and it is true that evidence of value at such time and place of shipment was admitted without objection. According to our theory of the case, the contract in its entirety is valid, and hence this was the proper measure of damages. But defendants in error, in the face of a declining market, and in utter absence of any evidence as to the destination value or the value at the time shipment should have arrived at its destination, cannot rely upon this saving clause of the shipping contract, and yet, in the same breath, maintain that the bill of lading in its entirety is a mere nullity because of some alleged tariff defect or for want of consideration. The shippers' acceptance and reliance upon the advantageous provisions of the bill of lading afford the same estoppel that would confront them had they accepted a reduced rate and then attempted to repudiate a limited liability contract that was coupled with that reduced rate.

Respectfully submitted,

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Of Counsel.

No. 107

IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

v.

PORTER-WEAVER AND COMPANY, *Defendant in Error.*

BRIEF FOR APPELLEES.

J. C. MARSHALL,

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IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILWAY COMPANY ..... *Plaintiff in Error,*

v.

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BRIEF FOR APPELLEES.

It will be seen that the bill of lading in question is in two parts, the first covering the inland haul by rail from Earl, Arkansas, to Brunswick, Georgia, being port A and the second part covering the ocean carriage from Brunswick to Liverpool being port B. The inland rate is 98½ cents, and the ocean rate $1.95. These are combined for convenience, but our laws State or Federal do not control the ocean carrier which in this case was the Leyland Line. Our concern here is only with the inland haul.

This part of the bill of lading contains an exemption from loss by fire and its legal validity is the first question which we wish to present to the court. Our Statute (C. & M. Dig.), provides as follows:

> "Sec. 843. Contracts abridging liability. It shall be unlawful for any railroad or any of its agents or employees to enter into an agreement or contract with

any shipper of any live stock, merchandise or other freight for the purpose of abridging, modifying, limiting, or abrogating the statutory and common law duties and liability of such railroad as a common carrier, and all agreements and contracts made for that purpose are hereby declared to be void, and the same shall not be enforced by any of the courts of this State. Acts 1907, p. 557, Sec. 1.

Sec. 844 declares void any rule or regulation limiting the common law rights of shippers.

It is clear that if this statute applies to the shipment in question the case must end here because it prohibits any contract or rule or regulation which limits the common law liability of a carrier and the bill of lading and regulation sought to be enforced here would so limit its liability because the loss was not from an act of God or the public enemy or other exemptions allowed by the common law. In other words by the common law the carrier would be absolutely liable for the loss of the cotton in question on account of its duty as a carrier. A great many States have provisions like this either in their statutes or constitutions, and their decisions have all been to the effect that such provisions absolutely prevent such limitations. The contention is made by Counsel that said statute does not apply to this shipment which was an export shipment, but that Federal laws govern and we now take up the discussion of that question.

The State of Iowa has a statute similar to it and in a shipment of cattle from that State to Chicago, Illinois, a loss occurred and the validity of that statute was called in question on account of a limitation of liability contained in the bill of lading; the statute was sustained, and the case was taken by writ of error to the Supreme Court of the United States. It is reported in *Ry.* v. *Solan*, 169 U. S., 133. The case was decided in 1898, long after the Interstate Commerce Act was passed requiring rates to be filed and to prevent discrimination by Railroad Companies, but before the Carmack Amendment was passed (which was in 1906) which amendment as we shall see lifted from the States all question of liability as to interstate shipments and placed them under Federal law, not however, affecting the old rule of the Government by State law insofar as lia-

bility for loss on the inland part of export and import shipments is concerned. In said last mentioned case the Supreme Court not only sustained the Iowa statute as having full force and effect in case of an interstate shipment, but also held specifically that the question of liability, (the loss having occurred in the State of Iowa just as this loss occurred in our State if that be material) was governed entirely by the State law. This case is a leading case and has been cited and approved in many cases in the Supreme Court. The court among other things said:

> "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of non-feasance or of misfeasance committed within its limits. * * * The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

In addition to the Solan case in Iowa (28 L. R. A., 718) which was affirmed by the Supreme Court as stated there are many other Iowa cases sustaining the statute as applied to interstate shipments prior to the Carmack Amendment which we need not cite. See *Winn* v. *Express Co.*, 128 N. W., 663.

In the State of Kentucky where there has long been a Constitutional provision preventing such limitation by carriers the highest court has frequently held said provision valid as to interstate shipments prior to the passage of the Carmack Amendment, and as will be seen all such decisions are equally applicable to the inland haul of export shipments even up to the persent time. *Ry.* v. *Sanders*, 80 S. W., 488; *Lewis* v. *Ry.* 25 L. R. A. N. S. 938.

In Nebraska there is a similar provision, and it has been sustained in many cases in that State as applied to interstate shipments prior to the Carmack Amendment. *Ry.* v. *Palmer*, 22 L. R. A., 335; *Ry.* v. *Vanderveter*, 3 L. R. A., 129.

A similar provision exists in Virginia and similar decisions have been rendered by the highest court of that State holding said provision applicable to interstate as well as state shipments. In *Southern Express Company* v. *Keeler*, 64 S. E., 38, the court said: "It was the manifest purpose to relegate him to his common law rights and responsibilities independent of contract." *Ry.* v. *Pugh*, 64 S. E., 35, and *Ry.* v. *Beasley*, 3 L. R. A. N. S., 183.

In the same way the Arkansas statute has been applied in a number of cases involving State and interstate shipments. *Hafer* v. *Ry.*, 105 Ark. 310; *Ry.* v. *Ward*, 111 Ark., 102.

It is perfectly clear that said statutory provision will prohibit limitation of liability of a carrier where the contract of shipment is made in this State (and the loss occurs in this State which some cases hold to be material) regardless of whether the shipment is to be made to another State or to a foreign country unless the laws of the United States have intervened and superseded the State law on the subject. So the question we have now to consider is whether Congress has so acted upon this subject. As stated by the Supreme Court in the Solan case which was a case involving interstate commerce, state regulations on the subject do not interfere with interstate commerce and are not in conflict there-with until controlling statutes are passed by Congress. The same of course might be said of State regulations, in regard to foreign commerce. If the United States laws do not regulate or limit the action of the states in imposing liability on inland carriers of export or import shipments certainly no other laws would interfere. In *Liverpool, etc.* v. *Ins. Co.*, 129 U. S., the court said:

> "According to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citi-

> zens or residents thereof, and the performance of which begins there to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

In the annotation to *Ry.* v. *Hughes*, 63 L. R. A., 525, the writer says: (citing many cases.)

> "It is a well established rule that the validity of a stipulation, in a contract for transportation of persons or property from one state or country to another, limiting the carrier's common-law liability, is to be determined by the law of the place where the contract was made and the transportation commenced, without reference to the law of the place of destination, or to the law of the place where the alleged breach of contract or the loss or injury occurred."

We may now show the limitations which have been of late years imposed upon the states in the matter of liability of carriers in case of interstate shipments and those to and from adjacent foreign countries, but not affecting the States' power as to shipments like this. That field has been covered by the Federal Statutes and decisions and the State laws no longer apply as to liability for loss in case of such shipments, but unless there has been a similar limitation of the States in matters of liability of inland carriers of shipments like this, jurisdiction of the States in that respect must remain as it has always been.

In 1906 as a part of the Hepburn Act the Carmack Amendment was passed which proved to be very far-reaching in its effect, and as construed by the courts was the first Federal Statute which superseded the power of the States to control by Statute or judicial decision the question of liability of carriers of interstate commerce. That amendment is part of Sec. 20 of the Interstate Commerce Law, and reads as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any

common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to the passage of that amendment the Solan case referred to was decided and also the Hughes case in 191 U. S., 477, which reviewed the legislation of Congress up to that time and held that it did not control the question of liability of interstate carriers. The court in Hughes case said that the acts of Congress up to that time provide:

"For equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places; for the publication of particulars as to charges, rules and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days notice to the commission; against reduction of joint tariff rates except after three days like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation." And then added that while under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight and has prevented carriers from obstructing shipments on interstate lines we look in vain for any regulation of the matter in controversy. (That is the matter of liability for loss or damage).

After the passage of the Carmack Amendment the Supreme Court decided various cases bearing upon its effect upon State laws, and in the case of *Adams Express Company* v. *Croninger,* 226 U. S., 491, a very full expression of opinion was given on the subject. The court after

quoting fully from the Solan case and the Hughes case and holding that prior to the Carmack Amendment the whole subject of the liability of interstate carriers was governed by State law, then took up the question of the effect of the amendment on the subject, and held that on all questions of liability of carriers for loss or damage to *interstate* shipments the laws of the State had been superseded by the Federal law. A great many other decisions of that court have followed the same line, and its effect never has been in the least disturbed. These cases held that contracts might be entered into by such carriers with shippers called released valuation contracts whereby the shipper by agreeing to a smaller valuation might obtain a lower rate, but they do not affect the rule established by the Carmack Amendment that interstate carriers cannot exempt themselves from liability for loss by fire or other causes not recognized by the common law. This released valuation practice was abused, and in 1915 the first Cummins Amendment abolished the practice in all cases, except where goods were concealed from view, thereby establishing the rule that interstate carriers could not contract against their common law liability for the full value of goods intrusted to them, and thereby doing away with released valuation contracts and all contracts like the one in question exempting from liability from loss of interstate shipments by fire and other exemptions not recognized by the common law. *Adams Exp. Co.* v. *Darden*, 265 U. S., 265. This statute was thought to be too drastic, and in 1916, the second Cummins Amendment was passed restoring the practice of released valuations provided a separate rate was issued by the authority of the Commission upon which each valuation was based, but making no change in the rule that prevented any contract exempting the carrier from its common law liability with the exception of certain kinds of property which is immaterial here. McCaul-Dinsmore case, 252 F 664, affirmed, 253 U. S., 97.

It will be observed that the Carmack Amendment is confined by its terms to *interstate* shipments. The Cummins Amendment enlarged its scope by including shipments to *adjacent* foreign countries, but said nothing about export or import shipments which pass from or to *nonadjacent* foreign countries. *It has been decided a number of times by the interstate commerce commission and by Federal and*

State Courts that the Carmack and Cummins Amendments have no application to these last named shipments. Hamlen v. *Ry.*, 212 F. 324. *Dexter* v. *Davis*, 281 F. (CCA) 385; *Fahey* v. *Ry.*, 114 At (Md.), 905; 52 ICC Rep., 671, In re Bill of Lading.

As stated, the very language of these amendments shows they have no application to the inland haul of export or import shipments. This statute and these authorities settle the case. The grounds for the writ of error are insubstantial, and we resisted its issuance for this reason. The writ should be dismissed. *M. K. & T. Ry.* v. *Sealey*, 248 U. S. 363. Nothing further need be said; yet to meet counsel's argument we go further. We may ask when and how has the jurisdiction of the State over the subject of liability of carriers of such foreign commerce to and from the port been taken away, and where has it been lodged? Opposing counsel states that this shipment is governed by the Federal laws as to liability for loss. We would like for him to point out the statute which has taken this matter away from the State. The statute we have cited has no application to interstate shipments as was held of the Iowa Statute (*Ry.* v. *Cramer*, 232 U. S., 490), but until he can point to a Federal Statute which has done the like as to the inland haul of shipments to or from non-adjacent foreign countries we must maintain that our statute is still intact as to that.

In *Liverpool, etc.* v. *Ins. Co., supra,* an export shipment from New York was held to be governed by the laws of New York as to exemption from liability for loss. The court saying: "The contract being made at New York, the ship owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract."

Under Section 2004 of "Traffic Law" a late work on carriers, the writer says:

> "The *liability* provisions of Section 20 (Carmack Amendment) do not apply to commerce between the United States and *nonadjacent* foreign countries, and this is true whether the inland movement is through two or more states or confined wholly within one state. *Commerce to non-adjacent foreign countries as far as*

> *the inland rail movement is concerned is governed by the rules of the common law* and the ocean transportation is governed by the act of Congress of February 13, 1893, known as the 'Harter Act'."

Of course the words "common law" as here used include State statutes like that in question passed in aid of the common law.

This is not saying that other parts of the interstate commerce law do not apply with all their force to the inland haul of a shipment like this. Requirements for publishing rates and to prevent discrimination and other provisions of the Federal Act apply to a shipment like this from one state to a port in another state for exportation. In Traffic Law, at section 3037A, the law in this respect is stated as follows (citing a good many authorities).

> "The Act to Regulate Commerce provides that the commission shall exercise jurisdiction over the inland portion of the haul, either to or from a foreign country; and it must logically and necessarily follow that the rate which must be filed with the commission under Section 6 of the Act is the rate governing such movements. * * * The rates of transportation from places in the United States to ports of transshipment, and from ports of entry to places in the United States, of properties in foreign commerce carried under through bills of lading, are required to be filed and published by the Amended Interstate Commerce Act. * * *." And see *Armour* v. *U. S.*, 209 U. S. 56.

That part of counsel's brief pertaining to the effect of the Arkansas statute is based entirely upon the idea and argument that when Congress enters the field upon any matter its action is exclusive of that of the State. This statement properly qualified and understood might be correct, but as a generality it is misleading and useless. The question at once arises as to what field is entered by Congress; if it is meant that just because Congress has legislated upon the general subject of commerce, every regulation of the State as to interstate and foreign commerce is prohibited, the statement is absolutely wrong. As early as 1887, Congress passed the Interstate Commerce Act, and yet the action of the State upon various phases of interstate com-

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merce was not interfered with. One of these was the subject of regulation of damages for loss which was not covered by those laws. They covered only the matter specified, such as fixing rates, prohibition of discrimination, etc. In the Croninger case, *sup.*, construing the Carmack Amendment, this is distinctly held, and it is held that prior to that Amendment the subject of loss by carriers was not covered by Federal Statutes in any sense, and that Amendment was held to apply only to interstate shipments. It has been often decided and never disputed that the Carmack Amendment which pertains to liability for loss applied only to interstate commerce and nothing more. How it can be claimed that the Carmack Act which covers the ground only of loss in interstate shipment and the Cummins Acts extending it to commerce with adjacent foreign countries cover also the field of loss in case of commerce with non-adjacent foreign countries is beyond our comprehension. Certainly counsel does not claim that these three kinds of commerce are the same. Certainly the inland haul of commerce like this is not governed by the Carmack or Cummins Acts, but by the common law and State laws modifying same as to loss or damage. It certainly cannot be said that Congress in providing a rule of damage in interstate and adjacent foreign shipments has entered the field and provided a rule of damage in shipments like this. The cases in the Federal Supreme Court which lay down the rule as to the conflict in Federal and State laws in matters of commerce are very numerous and it is not necessary to cite many of them, as it is nowhere held that State action is prohibited except where the particular subject matter has been provided for by Congress. We will first notice the cases cited by counsel on this, and will easily show that not one of them bears out his contention, but fully bears out ours. We will also cite other cases which illustrate the rule.

In *Ry* v. *Commrs.* 236 U. S. 439, cited, the Federal statute required grab irons on the sides *and* ends of cars, while the Indiana statute requires them on the sides *or* ends. Of course it was held that the former covered the field of safety appliances on cars and was exclusive. The case bears no resemblance to the instant case, where Congress has entered the field only as to loss in interstate shipments and those to and from adjacent foreign countries, and as seen, did not do that even until the Carmack and Cummins

Amendments were passed, prior to which time, as we have fully shown, such loss was governed by State law, or by the common law in case no State statute existed, although the field of legislation in other respects had been entered as early as 1887. Counsel seems to think that liability for loss is the same field as that for discrimination and various other matters of regulation, and that liability for loss in interstate commerce or commerce with an adjacent foreign country is the same as liability for loss in commerce like this. But, as seen, these are distinct fields, and Congress and all the courts have so treated them. We defy counsel to cite a single case or statute, State or Federal, showing that Congress has entered the field of regulating liability for loss in case of shipments like this.

In same way the case of *Rd. Co.* v. *Winfield*, 244 U. S. 147, cited, sustains us and not him. There the Federal Act fixing the liability of interstate carriers to their employees distinctly confines all such liability to cases of negligence and necessarily excluded all State laws on the subject, whether based on negligence or not. The field was completely covered by the Federal Act. Counsel cannot show, as stated, a single Federal Act covering expressly or impliedly the matter of loss by carrier of shipments like this; he can show nothing except an act governing loss of interstate carriers or carriers to adjacent foreign countries, which is a subject as far removed therefrom as is one pole from the other. The very expression in the statute of one excluded the other.

Railway v. *Reid*, 222 U. S. 424, cited, was a clear case of a State law attempting to interfere with an interstate shipment, and a glance at the opinion will show that it sustains our position in every respect.

In case of *Mo. Pac.* v. *State*, 222 U. S. 370, cited, the State passed an "hour of labor" statute almost identical with that passed by Congress, but the latter did not go into effect until one year after its passage. The latter was admitted to be exclusive, and the case is not in point here. The contention was as to whether the act was exclusive during the year after its passage, and it was held so to be.

In the case of *Ry.* v. *Public Serv. Comm.*, 242 U. S. 255, the State headlight law was attacked as being superseded by the appliance act of Congress. The court cited the case

of *Railway* v. *Georgia*, 234 U. S. 280, as holding to the contrary, but declined to decide the case because no Federal question was raised.

It is hard to see why *Rd. Co.* v. *Varnville*, 237 U. S. 597 was cited, as it holds just as we have reiterated that the Carmack statute covers the subject of liability for loss in case of interstate shipments, and that a law of the State in conflict therewith was void.

The cases of *Ry.* v. *Rankin*, 241 U. S. 327; *So. Exp.* v. *Byers*, 240 U. S. 612, and *Ry.* v. *Starbird*, 243 U. S. 592, cited on this point, are cases of loss in interstate commerce clearly taken out of State control by the Carmack and Cummins Acts, as are all the others cited on this. Why does he not cite a case holding that the inland haul of a shipment like this is governed as to liability for loss or damage by Federal laws? He cannot do so, for the cases on the subject (we have already cited them) hold to the contrary. Counsel throughout his brief naively speaks of Congress entering the field of "foreign commerce" and says the Cummins Act covered that field by extending the Carmack Act to commerce with adjacent foreign countries. The different kinds of commerce are not recognized. It is the first time we ever heard that an act passed on one subject would govern as to another distinct and unrelated subject. No authority is needed to refute such a fanciful idea; but those cited by counsel refute it by holding that the exact subject-matter of the State Act must be covered by the Federal Act or the former remains in force.

"This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Ry.* v. *Haber*, 169 U. S. 613. "These cases recognize the established rule that a State law enacted under any of the reserved powers especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject." *Ry.* v. *Harris*, 234 U. S. 412. "The test, how-

ever, is not whether the State legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control." *Meeker* v. *Rd.* 236 U. S. 434. (Congress in its legislation has not even mentioned the kind of commerce here involved, and of course, has not exerted exclusive control over it). "Congress has not by any statute covered the whole subject of the transportation of live stock among the several States, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the States of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases." *Reid* v. *People*, 187 U. S. 137. These are mere examples of the statement of the rule by the highest court.

As stated, the cases on this are many, and not one lends aid to the view that Congress has entered the field of regulation of loss in shipments like this. Every case that counsel has cited or can cite necessarily sustains our position. We may cite additional cases holding that State laws are in force because Federal laws have not occupied the field as follows: *Ry.* v. *State*, 219 U. S. 453, as to number of men on a train; *Rd. Co.* v. *Georgia*, 234 U. S. 280, as to headlight; *Rd. Co.* v. *Alabama*, 128 U. S. 96, as to examination of trainmen; *Rd. Co.* v. *People*, 165 U. S. 628, as to manner of heating trains; and as stated, there are numerous such cases.

So when it is said that the field of regulation of foreign commerce has been covered by the Cummins Amendment, and that while that is confined to commerce with adjacent foreign countries the silence of Congress as to commerce with non-adjacent foreign countries makes it exclude State regulation of the latter, an egregious error is committed. As seen, the Carmack Amendment covered only interstate commerce and it required another act, that is the Cummins Amendment, to extend it to commerce with adjacent foreign countries; but counsel now extends it to non-adjacent foreign countries without any further act of Congress. He makes both kinds of foreign commerce the same, whereas they are as different as night from day and are so treated by Congress and all the decisions. See *Galveston etc.* v. *Woodbury*, 254 U. S. 357. Domestic bills of lading are used for the one but not for the other.

Railroads which run trains across the border into countries like Canada can easily be and have been regulated by those acts as to liability for loss, but we cannot regulate ocean carriers of export and import shipments, and we have not attempted to regulate by national law the matter of liability for loss by inland carriers of such shipments to or from the ports. As seen, the Carmack and Cummins Acts have often been held not to apply to such shipments, and this is shown indeed by the express words of the acts themselves, yet counsel in disregard of those decisions and the express provisions of the statutes says they exclude State regulations or such shipments. This they could not do unless they applied to such shipments.

It is noticed that counsel says if Congress enters the "field of regulation" of commerce that excludes state regulation. We might ask "regulation in what respect?" There are many hundreds of distinct matters of such regulation by Congress and by the States, and it is only where they occupy the same specific ground of regulation that the latter gives way. All the cases on this so hold, as seen. We have cited cases holding that notwithstanding the many regulations of commerce in its various phases, the field of liability for loss in shipments was not covered even as to interstate shipments and those to adjacent foreign countries until the aforesaid acts were passed. So it is impossible to say that the field of loss in shipments to or from non-adjacent foreign countries has been covered unless those acts cover it, and, as seen, they do not do so.

Inasmuch as the field of loss or damage in commerce like this has not been entered by Congress, and is not covered either by its express acts or by its silence, all arguments of counsel based on this premise must fall to the ground. Counsel argues that as Congress has entered the field in question, but has remained silent as to regulation, the regulation is furnished by the common law as interpreted by the Federal courts.

We think the rule as to silence of Congress has been misapplied by counsel, for when Congress speaks and occupies a certain field, as counsel says has been done here, there is no silence. It is not a case of silence but a case where Congress must speak distinctly upon the subject to the exclusion of the voice of the State. But, as seen,

Congress has not spoken at all upon liability of carriers in cases like this. Counsel has confused, as it seems to us, the true rule as to silence of Congress with the rule as to conflict in State and Federal regulations where both speak in conflict, and then Congress occupies the field. The true silence rule is that where Congress has not spoken at all, but the State by taxation or other regulation has attempted to impose a burden upon commerce. *State* v. *Gas Co.*, 265 U. S. 298. There the silence of Congress restrains the State from making the regulation, but where the State's action, as here, is not a burden upon commerce, then it must stand unless Congress has spoken to the contrary on the same matter of regulation.

In many of the cases we have cited the fixing of a rule of loss was specifically held a matter of remedy and not a burden on commerce. The mere fact that the Iowa statute was held valid in the Solan case shows that it was not a burden on commerce, and by the same token the Arkansas statute is not, but it is a valid State regulation, except as to interstate shipments and shipments to adjacent foreign countries which have since been regulated by Federal law. It is enough on this to repeat that prior to the Carmack Act all suits for loss in interstate shipments were governed by State laws, as all pertinent cases declare and none dispute; and the same was true of loss in shipments like this and is still true of them because Federal laws have not taken control of the latter as they have of the former.

Counsel's contention being, as seen, that although Congress has passed no law regulating liability for loss in shipments like this, yet it has entered the field by passing the Cummins Acts regulating loss on an entirely different kind of shipment, and that the law regulating this shipment must be found in the Federal decisions, he might as well say Congress entered the field of liability like this when it passed the Carmack Act, for it took over by that act liability for loss in another kind of commerce, that is interstate commerce. It is all commerce, and the field of regulation of loss in commerce with non-adjacent foreign countries like this is as nearly taken over by the Carmack as by the Cummins Acts, as neither touches it at any point. We have already shown that Congress can enter a field only by passing an act taking over the particular field entered. The Federal courts cannot take it over, as counsel would have

us believe. His theory of Congress entering a field without an act exclusively covering it and taking it away from the State is unsupported by any decision, State or Federal. And it is without reason or logic to sustain it. But let us follow it up a little. He admits that the Carmack and Cummins Acts do not regulate liability for loss in shipments like this. He must say this or the Federal statute itself would render this exemption illegal and void. Then if Congress left this kind of shipment out of its regulation of loss, how was it taken away from the State? He is forced to say that the Federal courts, without any act of Congress, have robbed the State of this power and have set aside its statute legally passed. Such a result would, to say the least, be monstrous. All pertinent cases declare that those courts not only cannot do such a thing, but that where no paramount act of Congress intervenes (and counsel admits there is none here) they will enforce the State law as they find it, whether such law be statutory or the product of State decisions. It is only where neither is shown to exist that they will make a law of their own as in the Hart case, 112 U. S. 331, cited by counsel. (And that case did not involve exemptions from loss like this, but involved the validity of released value contracts in case of negligence). Counsel's quotation from the Croninger case condemns his theory utterly. It is there held that both Federal and State courts will follow a State statute regulating liability as that in the Solan case did (and as this one does). This is conclusive that the Federal courts would follow the Arkansas statute on liability instead of setting it aside, as counsel argues, there being no paramount Federal law, and the question of following a common law rule or a rule of their own which counsel discussed does not arise. His position when stripped can mean only that a Federal court would be bound to follow the Hart case or the Cau case, 194 U. S. 427, as to carrier's liability in this case, instead of enforcing C. & M. Dig., Secs. 843-4, which we all know is not the case, and know that it would enforce our State statute instead. Not only this, but without a State statute, as seen, they follow rules of liability established by State courts when no controlling Federal statute intervenes. *Ry.* v. *Hughes*, cited in Croninger case. In the Hughes case the court said: "We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a

statute or resulting from the rules of law enforced in the State courts."

The cases of *Cau* v. *Ry.*, 194 U. S. 427, and *Arthur* v. *Ry.*, 204 U. S. 505, cited, were decided, the one before and the other upon facts arising before, the statute in question was passed, and of course the court construed the common law rule to suit itself; but if our statute had been in existence, then according to the Solan case and the others cited, the Supreme Court in those cases would have been bound by and would have followed our statute. In *Rankin* v. *Ry.*, *supra*, the court says "the essential choice of rates must be made to appear." And same is held in 236 U. S. 278. (*Pierce* v. *Wells Fargo*). These later cases seem to conflict with above two cases.

The case of *Simmons Hdw. Co.* v. *So. R. Co.*, 279 Fed. 929, is here cited as showing that an exemption from loss by riots was held valid. That shipment was interstate, and as the loss occurred July 2, 1917, the second Cummins Act controlled and no exemption could be valid except those allowed at common law, among which riots was not included, and only one rate was allowable for a full liability contract, although a released value contract would then as now admit of another rate. The shipment there was made under a bill of lading framed by the commission before it was held in McCaul-Dinsmore case, in 253 U. S. 97, that no exemption from common law liability could be allowed under the Cummins Act, which may account for the illegal exemption being found in the bill of lading. Those framed since the decision just cited no longer contain the exemption from loss or damage on account of riots, but only an exemption of loss or damage from *delay* caused by riots or strikes, which is an exemption allowable under the commonlaw. The court held the exemption from loss by riots valid under the Cummins Acts in the face of the case last cited by saying that those acts apply not to a loss exempted by the bill of lading, but only to valuation in case of loss for which the carrier is lawfully liable. But the cited case from the Supreme Court and all others on the subject hold that those acts prevent all exemptions of liability for loss or damage by bill of lading except those allowed at common law. The court then says that were it otherwise the last Cummins Act excepts property (except ordinary live stock) concerning which the carrier is authorized by the

commission to establish rates dependent on value declared in writing, etc. But this merely legalizes released value contracts which the first Cummins Act had prohibited and makes the value agreed on by the parties binding. It has no reference to the prohibiting of restrictions of full liability for loss or damage except as allowed by the common law. A writ of error was taken from this erroneous decision, but it was dismissed in Supreme Court because not filed in time.

That part of counsel's brief which invokes Sec. 25 of Interstate Commerce Act (added by Transportation Act of February 28, 1920) is easily answered. That section in terms applies only to shipments in American registered vessels, while the shipment in question here was billed for shipment in an English vessel. At that time, as shown by said rule 1, there had been no form of export bill of lading prescribed for this territory, but the carrier's export bill of lading was the only one in use for this shipment. This bill of lading the carrier could and did frame to suit itself. The Commission had nothing to do with it. Prior to February 28, 1920, it had been held that the Commission had no power to prescribe a form of bill of lading for either domestic or export traffic. *U. S.* v. *Alaska Steamship Co.*, 259 Fed. 273, 253 U. S. 113. On October 21, 1921, just a year after this shipment was loaded and burned, the Commission prescribed a bill of lading under said section 25, dealing, as expressly stated, "Only with the through export bill of lading for shipments to non-adjacent foreign countries, to be issued by carriers subject to the Interstate Commerce Act in connection with ocean carriers whose vessels are registered under the laws of the United States." Export Bill of Lading, 64, I. C. C. 347. It is seen from this that there was no form of bill of lading applying to this shipment except the carrier's bill as above stated, and when one was prescribed it did not apply to a shipment in foreign bottoms like this.

> "The mere creation of the Interstate Commerce Commission and the grant to it of a measure of control over interstate commerce does not of itself and in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the States to establish regulations conducive to the welfare and convenience of their citizens, even though

interstate commerce be thereby incidentally affected, so long as it is not directly burdened or interfered with." *M. K. & T. Ry.* v. *Harris*, 234 U. S. 412, and other cases.

So it is seen that if counsel were correct in his contention, the Commission not having taken action in the matter until long after this shipment was loaded and burned, and then not as to shipments like this, it could not be controlled by that provision.

Our next duty is to show that even if our statute did not exist, the exemption in question is without consideration and void. The rule is that a carrier primarily owes to the shipper the duty to carry goods under its full common law liability by which it becomes an insurer except as to losses caused by the act of God, the public enemy, and some other exceptions. It follows as a matter of course that any limitation of this liability must be paid for by the carrier, that a consideration must be given, the usual consideration being a lower rate for the restricted liability. In determining whether this lower rate was afforded in this case we must have in view the fact that this shipment involved the schedule of rates and other provisions of the Federal laws.

It is stated in 10 C. J., page 149, that the carrier "must hold itself out as being in readiness to transport the freight with or without such limitation and allow the shipper the choice between the limited liability contract and one imposing on the carrier the full common law liability, and if this is not done the contract is void and the limitation is inoperative. * * * The question is not what the contract recites in respect to the matter, but whether he (the shipper) had in fact the chance to choose between his common law rate and a lower rate with limited liability." The cases supporting these statements are almost innumerable, both State and Federal. The first Arkansas case on the subject is that of *Ry* v. *Cravens*, 57 Ark. 112, and the principle has been announced by our court many times since. In *Ry.* v. *Wells*, 81 Ark. 469, the court said: "No matter what the contract contains by way of recitals or stipulations, if no opportunity for non-restricted service is afforded then it is imposing the restricted contract upon the shipper without his consent." In the case of *Ry.* v.

Rankin, 241 U. S. 317, the court said: "The essential choice of rates must be made to appear. * * * It may become necessary for the carrier to prove its schedules in order to make out the requisite choice." And so in *Ry* v. *Oakley*, 115 Ark. 20, the court held that where the carrier has but one regular rate applicable for given property it is not a reduced or special rate, such as will serve for the limitation of the common law liability. And the same is held in a large number of cases in Missouri and other states. See as an example the case of *Leas* v. *Ry.*, 136 S. W. 963, where the court said:

> "It would be a logical absurdity to speak of a rate on a given class of property as a reduced rate when there is but one rate for such class. The adjective 'reduced' implies a comparison, and, if there is but one rate, with what may it be compared? It is not permissible to go outside of the subject-matter to seek a comparison. The rate on coal may be less than on dry goods, but that fact would not make it a reduced rate. Necessarily the comparison must be made, if at all, with another higher rate on the same class of property, and if there is no such rate there can be no reduced rate."

In this court and in the Supreme Court of Arkansas the rule has been stated in a similar manner, that is, that the shipper must be afforded a choice of rates, and of course, a corresponding bill of lading must be in readiness, and unless this is done any contract exempting from common law liability is null and void. The question then arises whether such a choice was afforded in this case. It is sought to be shown by introduction of a rule in the consolidated freight classification to the effect that if the shipper had called for a full liability contract, the same bill of lading could have been used by stamping certain words on it, and a corresponding rate could have been fixed by adding 10 per cent to the published rate.

To begin with we do not believe that this rule is in force as to export cotton shipments. The rule, it will be noticed, begins with saying "unless otherwise provided," thus leaving it wide open to any exceptions that may be embodied in other rules that may be promulgated and filed with the Commission. It is admitted

by defendant's witness that all the rate sheets and classifications have numerous exceptions which have to be followed out in order to determine what rule is in force. The provisions of the cotton schedules which were effective on the date of this shipment and which was introduced, show conclusively, we think, that the rule does not apply to this shipment. On the front cover of this cotton schedule is a provision worded as follows: "Governed, except as otherwise provided herein, by the Consolidated Freight Classification No. 1 p. 28." This clearly provides for what the rule relied on by counsel permits, that is, an exception contained in the cotton schedules or in the rules promulgated therein, thus excluding the use of rule 1 in case of shipments like this; hence such rule has no application here. At page 39 of the cotton schedule "item 130, bills of lading" is the following provision: (R. 17).

> "(c). Foreign bills of lading are to be used for cotton and cotton linters consigned to other destinations than on the American continent; that is, England, Germany, France, etc. The present form of foreign bill of lading is No. 1168-M and 1168½-M. (d) All bills of lading must be free from alterations or erasures, except as provided for in item No. 115, and must contain a correct description of the cotton or cotton linters covered, including marks, quantity, conditions, etc."

This provision as to export bills of lading for cotton shows that the agent had no choice in the use of bills of ladings for such shipments. It is agreed in this case that 1168½ and 1168½-M are used only for export cotton and 1168 and 1168-M only for other goods (R. 51), so that the form of bill of lading designated in the schedule as 1168-M is not used for cotton, but the one we have introduced shows that its liability provisions are the same as in those used only for export cotton. These forms of bill of ladings are introduced in evidence and may be seen by the court (R. 44). The form actually used in this case is 1168½; the only cotton bill of lading provided for in the schedule is 1168½-M; the only difference in these is that one is printed on one page and made longer while the other is printed on both pages. The rule quoted above which is contained in the schedule and is found under the head of rules and regulations prohibits the agent from making

alterations or erasures, except as provided in item No. 115, which merely requires the agent to write on the bill the condition of the cotton. As testified to by our witnesses, this rule exempts cotton from rule 1, and also prohibits the agent from stamping the bill of lading in the manner required by rule 1.

Now in view of the fact that rule 1 only applies where it is not otherwise provided, and that the cotton schedule is governed by the consolidated freight classification (which contains rule 1) only when not otherwise provided in the cotton schedule, and that the rule we have quoted fixing one bill of lading as the only one to be used as to export shipments of cotton, is under the head of rules and regulations governing shipments of cotton, we must conclude that rule 1 has no application to this shipment. Said item 130 not only prescribes an exact bill of lading for export shipments of cotton, but it provides specifically that said bill of lading shall not be changed in any manner by erasure or alteration, except as provided in item 115, which requires the agent to specify the damage to cotton in the bill of lading. In as much as cotton is a commodity which is largely shipped abroad as well as at home, and requires different rules and methods for proper transportation, it is not surprising that different and separate regulations should be made differentiating cotton shipments from all others, as we think has been done in this case.

We here present some excerpts from the evidence. W. H. Martin testified (R. 19): "Q. How many shipments of cotton do you suppose you made in that territory during—along the period of time you have been there? A. Well, I couldn't estimate it. Q. It would run up into the thousands, wouldn't it? A. Yes, both domestic and foreign. Q. Tens of thousands. Did you ever during that time change a bill of lading that was furnished you by the company by writing anything on it showing a different rate or something like that? Did you have any stamp by which you could change them into a different bill of lading? A. Well, there was a good many stamps, but whether there was applied on that, I couldn't say. Q. You mean stamps with names and dates, and such as that? A. Yes, but whether we had one for what you spoke of, I couldn't say. Q. Suppose a man had come there and had wanted to ship this cotton on a dif-

ferent bill of lading, what would you have done? Could you have furnished him with a different bill of lading than this? A. Yes sir. Q. How could you do it? A. By a clause in the official classification. Q. Well, how would you do it? A. Well, I don't know just how without looking at the clause in the classification. Q. Did you ever do that? A. No sir, I never have. Q. You don't know whether you had any stamp to do it with or not? A. No sir, I don't. Q. You never did write anything of that kind on a bill of lading? A. I never have written anything on them * * * Q. Could you have done that without advice from somebody higher up in the business? A. No sir, I wouldn't have wanted it. Q. You would have wanted to get directions from somebody higher up before you do it? A. Yes, in this case I would. Q. You would have done that? A. Yes, I would if it was requested for the change to be made. Q. Did you ever tell any shipper in the tens of thousands shipments you have made there, that there was a higher rate, and that they could get a different liability and a different bill of lading? A. No sir. * * * Q. Did you ever know of any shipments being made in that territory during the time you have stated, except on these regular bills of lading without anything written on them? A. Yes,—all I have ever issued is the regular bill of lading.

Mr. Burke said (R. 28): I started to say that under the provision of the tariff, Rule 1 in the official classification has nothing to do with cotton. It absolutely states—I think any traffic man will make the same—give the same opinion, in as much as these specific forms of bill of lading are prescribed.

Mr. McGee said (R. 30): Q. Did you ever hear of such a thing as a changed bill of lading by writing or stamping on it to make another bill of lading out of it? A. No sir, I never heard of it until here.

Mr. Aylen, for defendant, says on cross-examination (R. 60): Q. Isn't it a fact that if there are any specific provisions in the rate sheets or tariffs—if they are in conflict with the general provisions that the specific provision would control? A. Yes, they would. Q. You haven't undertaken to say from this cotton tariff here, I believe, that the shipment of cotton for export hadn't been taken out

from under that rule by the provision which has been read here? A. According to my interpretation of the tariff they have not been taken out, no sir. Q. But you would say if there is a specific provision in the rules which is in conflict with the general rule it would control? A. The rules in the individual tariff would take precedence over the classification. Q. Then if the language used in the cotton tariff is such as to show it was an exception to the general rule, it would take it out from under it? A. Yes sir."

The witness Sides (R. 51-3), testified very fully that the cotton schedule is withdrawn from Rule 1, and has nothing to do with it. He confirms in the strongest language everything said by Mr. Burke in this respect, and counsel after a most searching cross-examination was unable to shake him in the least.

Counsel relies on finding No. 2, but as a finding of fact based on the expert testimony introduced it is certainly not sustained by the evidence. And if the court wishes to test this finding by the schedules, rules and regulations introduced, they show on their face that our contentions are correct in every respect. Counsel says that this is a question of construction for the court of the documents adduced. If so, the finding of the court below has no binding force here, and this court must make its own construction from these documents. Counsel confines his objection to our position on this to the question of erasures or alterations of the bill of lading. He overlooks our other point, which is equally clear, that the cotton tariff is not governed by the consolidated freight classification No. 1 (which contains rule 1, providing for optional bill of lading according to counsel's claim) where the former contains exceptions thereto, and it does contain an exception by confining the agent to the use of only one bill of lading.

The testimony shows clearly that the company and its agents and all shippers had construed these rules in the way we contend that they should be construed. The agent stated that he had been employed in the cotton territory by defendant company for years, and has issued bills of lading for many thousand shipments of cotton to foreign ports; that he had never yet issued a bill of lading by writing or stamping upon it the words provided in Rule 1, and

that he had no knowledge of having such a stamp, nor had he ever varied from the schedule of rates by adding 10 per cent thereto. And he went further and said that if he had been called on by a shipper to furnish a bill of lading at a different rate from the regular published rate he would not have attempted to do it without consulting a higher officer of the company. It is true he stated on cross-examination that in such a case he would have endeavored to carry out Rule 1, but this does not qualify his former statements in the matter. In addition to what the agent said, we have the testimony of Mr. McGhee, a shipper of cotton for 30 years, especially export cotton on a very extensive scale, and he says that he never before heard of any rate on export cotton except the regular published specific rate; that he never heard of a 10 per cent increase in rate as a basis for unlimited liability, and that he never heard of and never used an optional bill of lading created by stamping certain words on the regular printed form furnished him by the company for export shipments of cotton. In addition to this we have the testimony of Mr. Burke and Mr. Sides, two expert traffic men of long experience, and who have served also as railway freight agents, and they say that the construction which we have placed upon the rules in the cotton schedule is correct, and that cotton is taken out from under rule 1 by these rules. The expert introduced by defendant simply stated in a general way that it is customary for the railroad company to have various stamps for use in issuing bills of lading. These of course include dates, names, etc. But he did not once state he had a stamp containing the words provided for in rule 1.

To show the absurdity of the rule as now used, its application to interstate shipments was absolutely abolished by the Carmack and Cummins Amendments. In other words, those statutes absolutely prohibit any bill of lading except one carrying full common law liability for interstate shipments and probihit any optional rate of the kind sought to be provided for in rule 1, that is one rate for a limited liability exempting loss by fire, etc., and one rate for common law liability. And yet they carry forward this rule as if it had full force to this today and in connection with interstate shipments; and the defendant's witness went so far as to say that the rule still has full force and effect in

regard to interstate shipments, thereby showing that he knew nothing about what he was testifying to in that regard.

To further show the fallacy of rule 1 as now sought to be used, we may state what is well known to be a fact, that it has been carried forward as applying to interstate shipments under the new uniform bill of lading now in use. This bill of lading itself enforces full common law liability, and it could not do otherwise and have legal effect. See McCaul Dinsmore case, *supra*. Yet by rule 1 the company could charge 10 per cent more for full common law liability when it is already bound to that liability by the bill of lading itself, and there is no consideration for the 10 per cent added to the rate published in the classification alongside of rule 1.

In Traffic Law, Section 2017-F, the writer says:

> "The obvious effect of the Cummins Amendment of March 4, 1915, to section 20 of the Interstate Commerce Act providing for liability for the full actual loss, damage, or injury to the property transported notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, is to nullify the dual system of classification and rate making as above described as far as it relates to interstate and foreign commerce. * * * Therefore, in so far as interstate and foreign commerce are concerned, the ratings provided in the Consolidated Freight Classification have automatically attached to them, by virtue of the 'Cummins Amendment' the carrier's full common law liability as imposed by section 20 of the act; and all provisions with reference to limitation of liability and which seek to impose ten per cent higher ratings when the property is not shipped subject to the carrier's terms and conditions, are null and void. It should be noted, however, that the Consolidated Freight Classification is filed with numerous State regulating tribunals throughout the Official, Southern and Western Classification Territories for use on intrastate traffic, and for this reason, *the dual system of ratings provided in the Consolidated Freight Classification is still lawful with respect to*

purely intrastate traffic, except in so far as they may be contrary to the law, rules, and regulations of the several States in which such classification is in use."

Going back to the rule that the shipper must be afforded a choice of rates, we must conclude that he was not here afforded such choice. The rule relied on makes it his duty to call for a different rate and a different bill of lading and places the burden upon him to do so. And yet the agent says that he could not have furnished a different bill of lading without consulting an officer higher up or that he would not have been willing to do so, which means the same thing. How can it be said that one shipper among many thousand shippers for a period of 30 years would hit on the idea or would have knowledge enough of traffic rules to know that he might ship at a full liability rate, when experienced rate men say that, taking the rules together, rule 1 does not apply to shipments of cotton, and how can an ordinary shipper be expected to take notice of the true meaning of any such rules, and to be required either to ship at a limited liability or call upon the agent for a different rate and a rate which no shipper ever heard of?

Not only was there but a single rate for this shipment (in as much as rule 1 did not apply to it) and as seen, but a single bill of lading provided, but the bill of lading here used was not filed with the Commission and was not printed in the freight classification or schedules posted by the company, and hence it was never officially recognized by the Commission. The rule calls it a carrier's bill of lading, and not being on file, notice of it could not be taken by the shipper, and the rule alone could not notify the shipper of any choice of rates, for he could not know that the bill of lading would or would not give him full liability protection. Most of the cases say that the choice must be actually presented to the shipper, but here it is sought to impute knowledge of the choice to the shipper from the printed matter on file. If so, then this matter must all be filed and posted. This was not the case here, for, as seen, the bill of lading was not contained in the classification or schedule and knowledge of its provisions could not be imputed to the shipper.

But if we assume for the sake of argument that constructive notice of rule 1 was sufficient to impute knowledge of the choice and that rule 1 governs this shipment, yet we

do not believe from the testimony of the agent and others in this case that the shipper was afforded the choice of rates and corresponding bill of lading required to bind him to a restricted liability. In this connection we wish to cite the case of *Hill Mfg. Co.* v. *Ry.*, 78 So. (Miss.) 187. There the notice to the shipper of his so-called right to an optional rate and bill of lading was contained in the bill of lading in words similar to those of rule 1 herein, to-wit:

> "The rate named herein is a reduced rate given in consideration of the shipper entering into the contract set out below. If the shipper prefers that the shipment shall be transported at the carrier's risk, limited only as provided by common law and the laws of the United States, and of the several States in so far as they apply, he can accomplish that result by notifying the carrier's agent, and shipping at a rate of 20 per cent higher than the rate indicated here with a minimum increase of one per cent per hundred pounds."

The bill of lading exempted loss by fire. The court said:

> "Coming to the second question, we think that the company is liable as an insurer under the common law rules governing carriers. It is clear from the agent's testimony and from the bill of lading introduced in evidence that there was no alternative rate at the Houston, Miss., office, and if the shipper had demanded a rate other than the one here in evidence the carrier would wholly have been unable to furnish a bill of lading. The agent undertakes to say that if the shipper had requested a higher rate he would have taken up the question with his superior officer and have ascertained whether he could have furnished such rate. We think that it is the duty of the railroad company to have the bill of lading at its office where the shipper applied in order to bind the shipper in a contract for a limited liability. The shipper does not have to wait until the agent can communicate with a foreign office or go to other places to find a bill of lading." Certiorari to U. S. Supreme Court denied.

It will be noticed that in that case the agent admitted that he would have been unable to furnish an optional bill

of lading, but that he would have had to communicate with his superior officer. The rule as stated by this court and Supreme Court of United States is that he must be in readiness to afford another rate and another bill of lading, and the agent's statement here, just as in the Mississippi case, shows that he could not have done so. As said by the Mississippi court, the bill of lading should be ready in the agent's office where the cotton is shipped and the shipper does not have to wait for the agent to communicate with a foreign office before receiving his bill of lading.

Counsel stressed the fact in evidence that the shipper filled out the bill of lading. But this is immaterial where it and the rate furnished by the carrier and no other is available as was the case here. Furthermore, in all the cases on that subject the limitation of the carrier's liability was valid and would have been enforceable had the contract been prepared by the carrier. Of course if the limitation against loss by fire is void under the law it is immaterial whether the bill was filled out by the shipper or the carrier.

Counsel says the words to be stamped on the bill of lading as per rule 1 do not constitute an alteration, but constitute an addition, according to the ordinary meaning of words. But according to rule 1 this stamp entirely changes the meaning of the bill of lading and makes a new bill of lading out of it. This could not be an addition, for that would leave it as before with the exception of the added words. It is an alteration if there ever was one, for it completely changes the meaning and effect of the instrument.

Counsel says too that our argument would do away with the addition of weights, descriptions, etc. Not at all. There are blanks in the bill and it is intended that same shall be filled out.

We see no mention in counsel's brief of our contention that even if the shipper must take notice of the classification and the schedules neither contained the carrier's bill of lading which was used and that he could not have known without this that he was allowed an optional rate and an optional bill of lading and therefore was not put on notice of his rights in that respect. According to the Mississippi and other cases which we cite, the agent could not have furnished an optional bill of lading because he must have

been in readiness to do so, and he admitted that he could not have done so by stamping the only bill of lading which he had, without taking time to communicate with his superiors, and he had no such stamp or they would have proved it. This was undoubtedly a denial of the right of the shipper to an unlimited liability contract, or at least it was a failure to afford him such a contract, which was the same thing.

Returning to Rule 1, it was placed in the classifications before the Carmack or Cummins Amendment was passed. When those acts prevented the use of any bill of lading except one for full liability and the use of any rate except a specific published rate based upon that liability, it was held by the interstate commerce commission that the dual rate and the 10% differential as contained in rule 1 automatically passed out of existence, the reason being that the specific rate then published had to be applied to the full liability contracts and could not be applied to the 10% increased rate which could not stand alone. As stated by the commission in matter of released rates 13 ICC. Rep. 550: "The lawful rates on file at this time therefore are the rates providing for the limited liability. The Cummins Amendment, by making contracts limiting liability for loss caused by the carriers unlawful, does not destroy these rates, but they remain in effect and are lawfully applicable, for the 10% increased rates are merely additional and cannot stand in and of themselves." See also quotation from Traffic Law, Sec. 2017 F. Sup., where the writer states that rule 1 is abolished by the statute except in so far as it may apply to intrastate shipments.

The proof here shows there was but one rate from Earl to Brunswick for both interstate and export shipments. The full liability rate was obtained by adding 10% to this rate, but these amendments caused this rate to be the full liability rate as to interstate shipments, the 10% increase being dropped. Then as the interstate rate was the same as that for export shipments, the 10% was necessarily dropped for export shipments, leaving the published rate for full liability in those shipments and making it necessary to fix a lower rate or a rate which was a certain percentage lower than that rate for limited liability. No such rate was fixed, but the old rate was retained and is now sought to be used as a lower rate for limited liability

whereas it is the rate for full liability as above stated. The most that could be said would be that if dual rates fixed by rule are still allowed as to export shipments, a new rule fixing the limited liability rate at about 10% less should have been made instead of still using the old rule which adds 10% to the old rate to obtain a full liability rate, and that if the present rule 1 is to be applied, a new rate should have been fixed for export shipments, to which 10% could be added to obtain a full liability rate. This has never been done. The result is they had no optional rate for export at Earl. They had the old dual form whose specific published rates attached only to full liability and they offered no less rates for the limited liability. They could not offer less rates for limited liability without a new rate for export shipments as the rate they furnished was an unlimited liability rate for interstate shipments between same points as seen.

Although not essential to our argument, we do not believe that under the later provisions of the Interstate Commerce Act and the decisions thereunder the carrier of a shipment like this can afford a choice to the shipper by any device such as rule 1 or otherwise than by giving a complete published specific rate for the full liability and another for the limited liability with a corresponding bill of lading for each rate thus established.

At the time the Oakley case, *supra*, was decided the Cummins Amendment had not been passed, and the carriers all over the country were assuming to use rule 1 as a means of furnishing optional rates and contracts in interstate shipments. The court in that case said:

> "The record shows that there was only one tariff rate from Rogers, Arkansas, to Skiatook, Oklahoma, over the route the apples were shipped, and that the shipper paid that rate. Therefore, there was no reduction in the rate of freight charged as a consideration for restricting the liability of the carrier or for fixing the measure of damages other than that imposed by the common law."

So it is seen that rule 1 was disregarded in that case and the published schedule rate was treated as the only rate. In the same way the Supreme Court of the United

States in a case (*U. P. v. Burke*, 255 U. S. 317) involving the inland haul of an import shipment wherein rule 1 as here was a part of the classification (see report of the case in 124 N. E. 119) ignored rule 1, and placed the decision upon other ground. The shipment was from Japan to New York by way of San Francisco; the inland shipment was over the Union Pacific; the court, among other things, in that case said:

> "The petitioner was an interstate common carrier by rail at the time of the shipment involved, and as such had filed with the Interstate Commerce Commission schedules of rates and regulations under which the property was moving at the time it was destroyed. By these schedules the carrier was bound, and to them it was limited, in contracting for traffic. *Southern Railway* v. *Prescott*, 240 U. S. 632, 638. The statute expressly provided that it should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than such as was specified in such schedules." (The valuation clause in the bill of lading is then set out). * * *
>
> "To this contention it is replied by the respondent: That it is admitted by the petitioner that its filed and published schedules contained but one rate applicable to the shipment as it was carried east of San Francisco; that that rate, $1.25 per 100 pounds minimum carload, was charged in the Yokahama bill of lading; and that, since no choice of rates was given, or could be given, to the shipper, any agreement, in form a valuation of the property, made for the purpose of limiting the carrier's liability to less than the real value thereof, in case of loss by negligence, was void and without effect." * * *
>
> "Having but one applicable published rate east of San Francisco, the petitioner did not give and could not lawfully have given the shipper a choice of rates, and therefore the stipulation of value in the Yokahama bill of lading, even if treated as imported into the uniform bill of lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law."

In *Ry* v. *Carl*, 227 U. S. 639 (an Arkansas case) the court said: "The lawful rate is that which the carrier must exact and that which the shipper must pay." In *Ry.* v. *Hooker*, 233 U. S. 97, the court said: "It was the purpose of the act to have but one rate open to all alike from which there could be no departure." In *Ry* v. *Maxwell*, 237 U. S. 94, the court said: "The rate of the carrier duly filed is the only lawful charge. A deviation from it is not permitted under any pretext." In the Armour case, 209 U. S. Sup., the court said the Elkins Act was intended "to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law." In *Ry.* v. *Fink*, 250 U. S. 577, the court said: "The purpose of the act to regulate interstate commerce, frequently declared in the decisions of the court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the commission."

In *Poor* v. *Ry.*, 12 ICC. Rep. 469, it is held that under the force of the interstate commerce act, the published rate has taken on a fixed and rigid character that does not permit it to yield either to importunity or to mistake. Regardless of the rate quoted or inserted in a bill of lading, the published rate must be paid by the shipper, and actually collected by the carrier; when once lawfully published, a rate, so long as it remains uncancelled, is as fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by a special act of Congress. Same has been held by U. S. Supreme Court.

Now if a schedule of rates is a statute binding both parties not to take or receive "more or less or different compensation" (as the statute provides) from that provided in the schedule or tariff, then such a statute cannot be put in force by rule of the company, but only by a schedule filed and published as required by law.

Their only answer to this contention is the citation of *Ry.* v. *Harriman*, 227 U. S. 657, and *Ry.* v. *Rankin*, 241 U. S. 319. But these were cases of released values in stock shipments decided under the Carmack Amendment and such shipments are not covered by the Cummins

Amendments. Under the Carmack Amendment released value contracts were permitted under the Federal decisions by merely stating what the rate would be for each value declared. Here the question is not one of released valuation but one of a common law or limited liability. We have shown that no optional rate was here furnished for a limited liability, and this avoids the limitation in question. We go further and contend that if such a rate were furnished for the shipment in question it would have to be by separate specific rates for each of the two liabilities, and the above cases are not in point on this.

In the case of *Hill Mfg. Co.* v. *Ry.*, 78 So. 187 *sup.*, the provision for an alternative rate, as seen, was contained in the bill of lading which operated as strongly as the rule here relied on to afford such a rate. The court in speaking of such rate said: "However, it appears to our satisfaction that there was no such rate at any office of the railroad company, because the railroad company had never filed any such rate with the Interstate Commerce Commission as required by law." Counsel says the court's decision was based on the fact that the company had never filed such rate with the Commission as required by law. But there was one rate filed, as stated in the opinion, and the rate above spoken of by the court was the optional rate which counsel says can be fixed by rule. Yet the rate in that case contained in the bill of lading was held insufficient for the purpose.

Counsel argues that although the specific published rates are as we stated, the same thing as rates specifically fixed by statute, yet that a rate established by an interminable series of rules and regulations by reference to other rates which the experts themselves differ about will be the same as a specific statutory rate. With all deference we do not believe any such thing. If Congress were fixing a specific rate it would do so in figures for each point and would not do so by a complicated system of references which few can be sure of and about which the experts are at loggerheads.

Counsel says the fact that of the thousands of shipments of cotton mentioned in the evidence not one was shipped except under the published specific rate and under the limited liability contract is not evidence that another

contract and rate could not have been given. We beg to say that the decisions on the question are to the contrary and there are many of them. When plaintiff asked for bills of lading to use in making shipments none were furnished, except those containing limited liability, and no rate was given to be filled in except the one published rate and this occurred to other shippers in thousands upon thousands of cases. If this doesn't tend to show that no other method of shipment or rate or contract was available nothing could do so. In *Ry.* v. *Stone*, 79 S. W. 1031, as an example, the court held that evidence of shippers that a carrier had never offered them any contract except one of limited liability tended to show that it did not hold itself ready to make a contract assuming common law liability.

We believe that we are entitled to a judgment, both because our statute prohibits the exemption clause relied on by defendant and the statute is not superseded by Federal law, and because if the above were not the case defendant has not shown that it afforded an optional contract and an optional rate such as the law contemplates, which would constitute a valid consideration for a limited liability.

Respectfully submitted,

J. C. MARSHALL,

Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 107.—October Term, 1926.

Missouri Pacific Railroad Company, Plaintiff in Error, *vs.* E. W. Porter et al.	In Error to the Supreme Court of Arkansas.

[February 21, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

October 21, 1920, at Earle, Arkansas, defendants in error delivered to plaintiff in error seventy-five bales of cotton for transportation to Liverpool, England. The carrier issued to the shippers an export bill of lading in two parts: the first covered the inland haul from Earle to Brunswick, Georgia, designated as port A, and the second covered the ocean carriage from Brunswick to Liverpool, designated as port B. The inland route specified was over the lines of railroad of plaintiff in error, the Mobile and Ohio, and the Atlanta, Birmingham and Atlantic. The inland rate for the railroads named was 98.5 cents per hundred pounds. The ocean transportation was to be by the Leyland Line for the rate of $1.95. The bill of lading contained, as applicable in respect of the service and delivery at Brunswick, a provision that, "No carrier or party in possession of . . . the property, herein described, shall be liable for any loss thereof . . . by fire . . ." After the bill of lading was issued, while the cotton was on the cars of the carrier and before they were moved from Earle, it was destroyed by a fire originating at the compress and which was not set by plaintiff in error. Sections 843 and 844, Crawford and Moses' Digest of the Statutes of Arkansas, declare that it is unlawful for any railroad to enter into an agreement with any shipper for the purpose of limiting or abrogating its statutory and common law duties or liability as a common carrier; that all agreements made for that purpose and any rule or regulation limiting the common law rights of shippers are void. Defendants in error brought this action in the Circuit Court of Pulaski County, Arkansas, to recover the value of the

cotton. Plaintiff in error contended—as it here insists—that these provisions of the Arkansas statute do not apply to the shipment in question; and that, if held to be applicable, they contravene the laws of the United States regulating interstate and foreign commerce. The Circuit Court applied the statute, and gave judgment for the shippers. The carrier took the case to the Supreme Court of the State, and there it was held that the Acts of Congress regulating bills of lading apply only to interstate commerce and to shipments from a point in the United States to an adjacent foreign country, and do not evince an intention to regulate bills of lading for shipments from a point in the United States to non-adjacent foreign countries. 168 Ark. 22. The case is here on writ of error allowed by the chief justice of that court. § 237, Judicial Code.

There is no claim that the loss was caused by any fault or negligence of the carrier; and, if the Arkansas statute does not apply to the shipment, the clause in the bill of lading exempting the carrier from liability is valid. *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427. The power of Congress under the commerce clause to regulate bills of lading in respect of such shipments is not questioned; and, if it has entered the field of such regulation, the state statute is thereby superseded. The Interstate Commerce Act extends to the plaintiff in error and to the other railroads named in the bill of lading over which the cotton was to have been transported from Earle, Arkansas, to the port of Brunswick, Georgia, and it also extends to the interstate transportation over the inland route constituting a part of the movement in foreign commerce. § 1 (1), (2) and (3). 41 Stat. 474. Among other things, the Act requires all carriers subject to it to establish and enforce just and reasonable regulations affecting the issuance, form and substance of bills of lading. § 1 (6). 41 Stat. 475. It directs the Interstate Commerce Commission to keep informed as to the manner and method in which the business of carriers is conducted, and "to execute and enforce the provisions of" the Act. § 12. 25 Stat. 858. It provides that whenever, after hearing, the commission shall be of opinion that any "regulation or practice whatsoever" of the carriers is unjust or unreasonable it may determine and prescribe what is just, fair and reasonable; and may make an order requiring the carriers to observe the regulation or practice prescribed. § 15. 41 Stat. 484. The Act requires a carrier receiving property for transportation from a point in one State to a point in another State

or from a point in the United States to a point in an adjacent foreign country to issue bills of lading therefor; and, to some extent, it regulates their provisions affecting the liability of carriers. § 20 (11)—Carmack and Cummins Amendments. 38 Stat. 1197. Section 25, added by the Amendment of February 28, 1920, 41 Stat. 497, was enacted to promote the business of common carriers by water in foreign commerce whose vessels are registered under the laws of the United States; it applies to shipments from points in the United States to non-adjacent foreign countries and requires the commission to do certain things in furtherance and regulation thereof. Subdivision 4 of that section requires a railroad carrier receiving a shipment to be delivered to such a vessel for further transportation to issue a through bill of lading which shall state separately the amount to be paid for railroad transportation, for water transportation and in addition, if any, for port charges. It requires the railroad as a part of its undertaking to deliver the shipment to the vessel and provides that it will not be liable after such delivery. The commission is expressly empowered, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, to prescribe the form of such bills of lading. The section does not apply to shipments in such commerce where the ocean carriage is by a foreign vessel. The record does not disclose whether the vessel on which the cotton was to have been carried was registered under the laws of the United States; and, in favor of the shippers, we assume it was a foreign vessel.

The question is whether Congress has entered upon the regulation of provisions in bills of lading affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a non-adjacent foreign country. All of the provisions referred to were in force when the cotton was delivered to plaintiff in error. No Act of Congress or order of the commission prescribed a form of bill of lading for this shipment. Cf. *In the Matter of Bills of Lading,* 64 I. C. C. 347, *et seq.; Alaska S. S. Co.* v. *United States,* 259 Fed. 713; same case, 253 U. S. 113. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment, or § 25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section 1 (6)

extends to all carriers and to all transportation subject to the Act; it prescribes a general rule applicable to all regulations and practices affecting the form or substance of bills of lading in order that they may be just and reasonable. And the commission is empowered and directed to enforce the rule.

The general regulation of the "issuance, form, and substance" of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction. *Napier* v. *Atlantic Coast Line Ry. Co.*, — U. S. —, November 29, 1926; *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, 102; *Penna. R. R. Co.* v. *Pub. Service Comm.*, 250 U. S. 566; *Charleston & Car. R. R. Co.* v. *Varnville Co.*, 237 U. S. 597, 604; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 505; *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370, 378; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, 618; *Houston* v. *Moore*, 5 Wheat. 1, 21, 22.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.